SYNOPSIS OF ARGUMENT.

1. The supremacy of monuments over courses, distances and quantities is an universal rule of interpretation. (19-36).
2. The rule could not be otherwise than universal, in view of its reason. (36-58).
3. The degeneration of the rule in particular jurisdictions. (58-64).
4. It is only through reformation in equity, if at all, that extreme discrepancies can be corrected. (65-70).
5. All the foregoing propositions are established by the very terms of the statute regulating Federal surveys. (70-73).
6. The equities of the case. (74-79).
7. Plaintiff is not chargeable with notice of the surveyor's dereliction, nor if it were, would its rights be impaired. (79-81).
8. The overlapping of lots as extended to the actual lake shore is no concern of defendants, nor is it legally important. (81-86).
9. Supremacy of the monuments called for, is not impaired by failure of surveyor to make actual measurements. (86-93).
10. Meander lines in their relation to the rule of monumental supremacy. (93-115).
11. Review of defendants' meander line citations. (115-138).
12. Jurisdiction to review the judgment. (138).

11510

SUPREME COURT
OF THE UNITED STATES.

OCTOBER TERM A. D. 1903.

No. 127.

SECURITY LAND & EXPLORATION COMPANY,
PLAINTIFF IN ERROR,
AGAINST
G. A. BURNS AND
MARY L. BURNS,
DEFENDANTS IN ERROR.

ERROR TO SUPREME COURT OF MINNESOTA.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF CASE.

The action, which in the nature of ejectment, was brought in the District Court for the Eleventh Judicial District of Minnesota, where, after trial upon the

merits, a judgment was rendered in favor of the defendants. Upon appeal, the judgment was affirmed by the Supreme Court of the State. It is here, on writ of error to that court, as involving the construction of an United States survey and patent, and as presenting for review a decision against a right and title set up by plaintiff, under a statute of the United States, and an authority or commission exercised under the United States.

The action was brought to recover possession of the lands situate in St. Louis County, Minnesota, described as "all those portions of lots three, five, six and seven in Section four (4), Township fifty-seven (57) North, of Range seventeen (17) West, according to the Government Survey thereof, in said County and State, which lie west of a line drawn north and south through the center of said Section four." (P. 8 of Record).

The defendants by their answer denied that the land of which they were in possession in the west half of Section four, constituted any part of the plaintiff's lots 3, 5, 6 and 7, and alleged it to be a strip of unsurveyed public land, adjacent to the plaintiff's lots. (P. 9 of Record).

Upon the trial it appeared that the defendants were in possession, under a claim of right to enter the lands under the homestead law. (P. 58 of Record).

It was found by the trial court, that "between December, 1879, and March, 1887, all of said govern-

ment lots were patented and conveyed by the United States, pursuant to the laws relating to the disposal of public lands, and by patents containing the usual clause, describing the lands, *'according to the official plat of the survey of said lands returned to the General Land Office by the surveyor general;'* and that by divers mesne conveyances from said patentees, the title to said lots 3, 5, 6 and 7 * * * because vested in the plaintiff in the year 1891." (Finding 11, p. 58 of Record).

It was also found, that according to the field notes of the surveyor, and the official plat of the survey returned to the general land office by the surveyor general, plaintiff's lot 3 extended from the north line of the section and township, southerly to Cedar Island Lake, and that plaintiff's lots 5, 6 and 7, each extended from the west line of the section, easterly to the lake. (Finding 8, p. 58 of Record and Exhibit A, p. 72).

It was also found, that in his field notes on the external lines of this section four, the surveyor made, in two instances, erroneous or false report of the distance between a section corner and the lake. The lake intersects at one point, the south line of the section, and at another, the east line; extending thence in an easterly direction. In his notes of the survey of the south line of the section, which is also the south line of plaintiff's lot seven, the surveyor stated the distance from the southwest corner of the section, east-

erly to the point where the south line is intersected by the west shore of the lake, as 12.10 chains, (p. 35 of Record); and in his notes of the survey of the east line of the section, he stated the distance from the northeast corner of the section, southerly, to the point where the east line is intersected by the north shore of the lake, as 26.10 chains, (p. 32 of Record).

Between each of these section corners and the lake, the actual distance is much greater than thus reported. Just how great the discrepancy is, was not found by the trial court in chains and links; but by reference to the court's twelfth finding of fact, where the extent of the discrepancy is found in terms of acreage, (pp. 59 and 60 of Record), and to the diagram Exhibit B, which the court attached to its findings as being drawn upon a scale, and as correctly delineating the shore of the lake both as it was shown upon the government plat, and as it actually existed, (pp. 58, 72½, 73 and 75 of Record), it sufficiently appears that the length of the south line was understated to the extent of about 48 chains, and that of the east line, to the extent of about 39 chains.

With reference to the length of each of these lines,—the south line and the east line of this fractional section, the calls for distance and monuments respectively, were therefore widely discrepant; and it became necessary to determine, as between the call for distance, and the call for the lake as a natural monu-

ment, which should prevail. If distance is to prevail, then the land in controversy is an unsurveyed strip lying between the plaintiff's lots and the lake; if the natural monument is to prevail, then the strip of land in controversy is part and parcel of plaintiff's lots.

As will be seen by reference to page 36 of Record, the surveyor, according to his field notes, in tracing the meander of Cedar Island Lake, began at its point of intersection with the north line of the township, in Section 3, traced the lake shore southwesterly across that fractional section to the post which he reported having placed where the lake shore was intersected by the line running south between sections 3 and 4, (p. 32 of Record), then by specified courses and distances, across section 4, to the post which he reported having set at the point where the shore was intersected by the line running east between sections 4 and 9. (P. 35 of Record). These reports by the surveyor of the courses *along* the lake as a natural monument, thus present a question which is the exact counterpart of that already noticed with reference to his reported courses and distances along the section lines *to* the lake as a monument. As against the natural monument, the one set of courses and distances can claim neither more nor less validity than the other.

As bearing mainly upon the origin of the discrepancy, findings were also made to the effect following:

That in 1876 one H. S. Howe, having been con-

stituted a deputy United States surveyor for that purpose, duly entered into a contract for the survey of the township in question, to-wit, Township fifty-seven North, of Range seventeen West, the southerly line of which township had been duly run in the course of a previous survey; that thereafter said Howe ran and marked the other exterior lines of said township, to-wit, the easterly, northerly and westerly lines thereof, and set posts at all section and quarter section corners on said three exterior lines, and also set a meander post upon the north line of the township as surveyed by him, where said line running west from the northeast corner of the township first encountered the shore of Cedar Island Lake, which is also called Ely Lake, (pp. 56, 57 of Record). That no survey of the interior of said township was ever made, and no section lines in the interior of the township were ever run by said Howe, with the possible exception of the west line of said Section 36, and no section or quarter section corners in the interior of the township were ever located, with the possible exception of the northwest corner of Section 36, and that no streams or lakes within the township were meandered by him. (Finding 4, p. 57).

That said Howe nevertheless filed with the surveyor general what purported to be field notes of the survey of the township, purporting to give all the details usually appearing in notes of that character; all

of which field notes, however, except those relating to the three above mentioned exterior boundary lines of the township were fictitious. (Finding 5, p. 57).

That from the field notes returned by said deputy surveyor, a plat of the township was made by the surveyor general, duly certified copies of which were forwarded to the General Land Office of the United States and the Local Land Office at Duluth, the same being the only plat ever made of the township, and the plat, by reference to which, all the lands in the township have been sold. A true copy of the plat is annexed to the court's findings, and will be seen at page 72½ of the printed record. (Finding 8, p. 58).

That the other section lines in the township intersecting the shores of Cedar Island Lake are four in number, to-wit: The east and the west lines of Section 10, the north line of Section 11 and the north line of Section 3, the length of each of which lines to the point of its intersection with the lake, was similarly, though not quite so largely understated in the field notes of the surveyor and upon the plat, thus presenting in other sections, questions similar to those arising with reference to Section 4, and thus exaggerating the lake, which had an actual area of about eight hundred acres, so as to give it an apparent area of about eighteen hundred. (Findings 7 and 8, pp. 57 and 58; and see diagram "Exhibit B," pp. 58 and 72 3-4).

The court attached to its findings a diagram, "Exhibit B," as correctly delineating the shores of the lake, both as they actually existed and as they were reported by the surveyor. (Pp. 58 and 72 3-4 of Record). A copy of this exhibit will also be found on the opposite page of this brief.

By its twelfth finding of fact, the court found in detail the acreage of the several lots in Section 4 treated as extending to the actual shore of the lake, and described the manner in which the several lots so extended would conflict with one another.

The court also found, that prior to the patenting of any of the lands in this township, the Commissioner of the General Land Office was advised by affidavit of one claiming to know the facts, that the alleged survey by Howe of these lands was fictitious, but declined to investigate the matter as proposed by the Surveyor General for Minnesota. (Finding 13, p. 60 of Record, and see pages 45-49, where the testimony on the subject will be found).

The findings can be seen in full at pages 56-60 of the Record. The stipulations of fact and testimony upon which they were based appear in full in the Record, pp. 12-55.

Although as noticed, the lots of complainant were by the official plat and the field notes shown to abut upon Cedar Island Lake as a natural monument, the lower courts disposed of the case by cutting off the

lots at points more than half a mile distant from the lake, on the ground that although the surveyor's reports of courses and distances were found to be mere fabrications or estimates, they were yet to be accepted as the more certain and reliable elements in the description of the lots.

It also appeared and was found, that between the complainant and the owners of lots 1 and 8 in Section 4, quitclaim deeds had been exchanged, whereby the dividing line between them, across the belt of land lying between the lake and the so-called meander line, had been fixed by drawing a diagonal line from the center of Section 4 to its southeasterly corner. (Record p. 15).

In the trial court and also in the Supreme Court of Minnesota, the case was, by stipulation, heard jointly with another similar action brought by the same plaintiff against one Henry Weckey, et al., involving issues identical in character, representing that part of the southeast quarter of Section 4 lying southwest of the above mentioned diagonal line of partition. In this court, in lieu of a joint hearing of the two cases, a stipulation has been filed that the same judgment that may be rendered in this cause shall be entered in the case against Weckey, which stands as No. 128 upon this term's calendar.

As the assignments of error serve only to present in their various aspects the general questions of law

underlying the controversy, a detailed discussion of the several assignments appears to be unnecessary. Assignments 1, 2 and 3, relate to the reception, against the objections of plaintiff, of testimony tending to show the absence of actual survey, and the magnitude of the discrepancy in acreage, thus raising the question of the relevancy of those facts.

Assignments 4 and 5 present through similar objections, the question of the relevancy of the fact that the defendants claim as settlers under the homestead law.

Assignments 6, 7 and 8 similarly present the question of the relevancy of the action taken by the Interior Department looking toward a re-survey of the lands in controversy.

Assignments 9 and 10, if the facts to which they refer are deemed legally material, are determinable by inspection of exhibit "B," p. 58 and 72 3-4. of record.

Assignments 11, 12 and 13 involve the accuracy of the court's legal conclusion that the lake, as a monument or boundary of the plaintiff's lots, as shown by the plat, and by the field notes of the east and south lines of the section, and of the meander line, should be rejected in favor of the courses and distances of the field notes.

ASSIGNMENTS OF ERROR.

The court below erred:

(1) In overruling the plaintiff's objection to that part of the second paragraph of the stipulation commencing with the words "but no evidence has ever been found," as incompetent, irrelevant and immaterial, and as not admissible under the pleadings. (Fols. 18, 10).

(2) In overruling the plaintiff's objections to that portion of paragraph 3 of the stipulation which had not been offered by the plaintiff, commencing with the words "there is no evidence that," as incompetent, irrevelant, immaterial and not admissible under the pleadings. (Fols. 19, 20, 11).

(3) In overruling the plaintiff's objections to the 5th numbered paragraph of the stipulation as incompetent, irrevelant, immaterial and inadmissible under the pleadings. (Fols 19, 11).

(4) In overruling the plaintiff's objections to the 6th paragraph of the stipulation, as being incompetent, irrevelant, immaterial and inadmissible under the pleadings. (Fols. 19, 12).

(5) In overruling the plaintiff's objections, upon the same grounds, to the 12th paragraph of the stipulation. (Fols. 20, 16).

(6) In overruling the plaintiff's objections, upon the same grounds, to the certified copy of the decision of the Secretary of the Interior of January 19, 1895. (Fols. 20, 70-78).

(7) In overruling the plaintiff's objections, upon

the same grounds, to the copy of the order from the Commissioner of the General Land Office, dated October 31, 1895, directing the Surveyor General to make a contract for the survey of these lands. (Fols. 21, 78-82).

(8) In overruling the plaintiff's objections, upon the same grounds, to the stipulation of admission, that pursuant to the directions of the Secretary of the Interior a hearing was had before the Surveyor General of Minnesota, of which hearing the plaintiff had notice and at which it appeared by counsel and objected to the hearing, for want of jurisdiction in the General Land Office, and that plaintiff took no further part in that hearing, and that the plaintiff had notice of the further proceedings leading up to the order for the survey shown in defendants' Exhibit "2." (Fol. 21).

(9) In finding that the side lines of lot one extended southerly to Ely Lake would appropriate substantially all the frontage of said lake within said section. (Fol. 89).

(10) In finding that if the side lines of lot 7 were extended easterly only a few feet of l ake frontage would be contained in said lot. (Fol. 91).

(11) In its conclusion of law that the pretended meander line of Ely or Cedar Island Lake as the same is described in the purported field notes, and as delineated upon the Government plat is the boundary line of the land owned by plaintiff in lots 3, 5, 6 and 7 in Section 4, Township 57, Range 17. (Fol. 92).

(12) In its conclusion of law that the defendants are not in possession of any part of the land in said Section four belonging to the plaintiffs and do not withhold from the plaintiff any land of which it is the owner or to the possession of which it is entitled. (Fol. 93).

(13) In its conclusion of law that the defendants are entitled to judgment, that plaintiff take nothing in said action, and for their costs and disbursements. (Fol. 93).

BRIEF FOR PLAINTIFF IN ERROR.

The case is governed by the elementary rule that monuments prevail over courses, distances and quantities.

Of the official township plat, by reference to which each of plaintiff's lots 3, 5, 6 and 7 were patented, (Finding 11, p. 58 of Record) a blue print copy is to be seen in the record as "Exhibit A," page 72. It delineates lot 3 as bounded on the north by the blazed north line of the township, and on the south by Cedar Island Lake; and lots 5, 6 and 7 as severally bounded on the west by the west line of Section 4, and on the east by Cedar Island Lake. This adoption by the surveyor of the lake as a boundary, converts it into a natural monument of his survey.

Grier vs. Penna. Coal Co., 128 Pa. St., 79, 95.

That the lake is the boundary of these lots, and is utilized as a monument by the surveyor, is with like distinctness, indicated by his field notes, already referred to in the foregoing statement, relating to the east line and south line of Section 4, and relating to the survey of the meanders of Cedar Island Lake, all

of which field notes are referred to upon the face of the plat as the same was certified by the Surveyor General to the General Land Office and the Local Land Office at Duluth, pursuant to the requirements of law. By statute the surveyor was bound to note the location of the lake as "a watercourse over which his lines would pass;" and by regulation he was required to record the meanderings of its shores.

Rev. Stats. Sec. 2396;
"Public Domain," A. D., 1883, pp. 598, 604-5.

"It is a well settled principle that when lands are granted according to an official plat of the survey of such lands, the plat itself, *with all its notes, lines, descriptions and land marks,* becomes as much a part of the grant or deed by which they are conveyed, and controls, so far as limits are concerned, as if such descriptive features were written out upon the face of the deed or the grant itself."

Cragin vs. Powell, 128 U. S.
Noonan vs. Lee, 2 Black, 499, 504.
Hardin vs. Jordan, 140 U. S., 371, 380.
County of St. Clair vs. Lovingston, 23 Wall, 46, 63.

"Where a survey and patent show a river to be one of the boundaries of the tract, it is a legal deduction that there is no vacant land left for ap-

propriation between the river and the river boundary of such tract."

County of St. Clair vs. Lovingston, 23 Wall, 46, 63.

"From data furnished by the surveyor the plats are prepared. One of the objects of the manual and law was to simplify the mode of disposing of the public lands, so that, without cumbering patents with descriptive field notes, the plats of the surveys should afford all necessary information to purchasers, and at the same time afford a convenient and certain description, by reference, of the land conveyed; and these official plats are made the basis of all sales and selections of public lands and are solely referred to in the usual patents to show what lands are patented."

Chapman vs. Polack, (Cal.) 11 Pac. Rep., 764.

"The map may be regarded as a daguerreotype of the land which the grantor intended to convey."

Vance vs. Fore, 24 Cal., 436.

In *Jeffcries vs. East Omaha Land Co.*, 134 U. S., 178, 194-5, in which it was held by the court, largely by force of the indications of the official plat, that a patent of a government lot shown by the plat to abut upon navigable water would pass accretions which had

formed between the date of the survey and the date of the patent, it was said:

> "The plaintiff on the other hand contends that the description in the patent of the land as lot 4, in effect made the river the boundary on the north, and passed the title of the United States to any new land that might have been formed before that time . . . The plat, of which a copy is annexed to the bill and marked "A," shows the Missouri River as the north boundary of lot 4 . . . No provision was made for running the north boundary of lot 4, but the river formed such north boundary without the running of any line there . . . In the present case the plat was made in accordance with the statute, showing the river as the northern boundary of fractional Section 21, and of lot 4 therein; and as the patent referred to the official plat of the survey, and thus made that a part of the description of lot 4, that description made the river the boundary of lot 4 on the north."

Upon like principle, in M'Iver's Lessee vs. Walker, 9 Cranch, 173, it was held that a creek which was shown by the plat to traverse the land, must be reckoned with as a natural monument to which courses and distances must be accommodated, although it did not appear upon the plat in the position of a boundary, and although not referred to either in the certificate of survey or in the patent.

The efficiency of a plat to invest with the charac-

ter of a monument, a water course or other way, which it depicts as the boundary of a tract of land, was strikingly exhibited in Barclay vs. Howell's Lessee, 6 Pet., 498, 510, where the indications of a plat that the conveyed land was bounded by a certain street, were enforced against an express inconsistent call of the deed itself for another boundary.

The grounds upon which, either by counsel for defendants or by the lower courts, it has been argued that the circumstances of this case are so exceptional as to withdraw it from the operation of the general rule in favor of monuments, may be completely tabulated as follows:

(1) That the rule is over-taxed by the magnitude of this discrepancy.

In this connection it is specially argued that as one consequence of the magnitude of the discrepancy, the patentees of these lots are chargeable with notice of the inaccuracy or fraud in the survey; that this survey, as being statutory, is distinguishable from those involved in certain other cases, where the supremacy of monuments has been enforced by this court against even larger discrepancies of distance; and that the confused manner in which the several lots which are shown by the plat to abut upon Cedar Island Lake will intersect and overlap one another if recognized as extending to the actual shore of the lake, is available

to the defendants as a reason why those lots should be terminated at the meander line.

(2) That the relative weight of monuments and distances is ultimately a question of intention, and that under the circumstances of this case, the lake as a monument, is a less trustworthy index to the intentions of the parties to the patents than are the specifications of course, distance and quantity.

(3) That in this instance, there was no actual government survey of the interior lines of the township, the field notes returned by the surveyor being largely fictitious.

The first and second of these contentions depend so largely upon an inquiry into the *reason* or principle which underlies the rule in favor of monuments, and otherwise so merge into each other, that both can be advantageously covered by a single discussion.

Briefly outlined, the propositions which we shall endeavor to commend to the approval of the court are: That the rule in favor of monuments is absolute and universal; and that such is the settled doctrine of this court; that the *reason* underlying the rule, is such as to require universality for every purpose of mere interpretation, and is such as to forbid the relaxations contended for by the defendants; that while the rule has never been avowedly repudiated by any American

court, there are three or four states in which it has been practically nullified by demonstrably vicious processes of attenuation; that the degeneration of the doctrine in those particular states is distinctly traceable to a misconception and misstatement of the *reason* of monumental supremacy; that in determining the weight of authorities cited on this subject, a sharp line of distinction must be drawn between those few jurisdictions where the rule has degenerated, and the many still administering it in its purity; and finally, that as has been repeatedly adjudicated here, the force of monuments returned and described by the surveyor, is not impaired by the fact that actual measurements were not made.

FIRST POINT.

Whatever may be its reason, the rule in favor of Monuments is universal; and such is the settled doctrine of this Court.

While perhaps, from the nature of the case, a judicial declaration of the universality of any rule, can not claim in full measure the credit of an adjudication, it approaches it closely, as being in substance a judicial determination of the *nature* of the rule, and when

reiterated broadly and with deliberation under a great variety of conditions, may well be accepted as authoritative.

"It may be laid down as a *universal* rule that course and distance yield to natural and ascertained objects."

Story, J. in Preston's Heirs vs. Bowmar, 6 Wheat, 582.

"In ascertaining the boundaries of surveys or patents, the *universal* rule is this; that wherever natural and permanent objects are embraced in the calls of either, these have absolute control, and both course and distance must yield to their influence."

Daniel, J. in Brown vs. Huger, 21 How., 305, 318.

"But ordinarily surveys are so loosely made, and so liable to be inaccurate, especially when made in rough or uneven land or forests, that the courses and distances given in the instrument are regarded as more or less uncertain, and *always* give place in questions of doubt or discrepancy, to known monuments and boundaries referred to as identifying the land."

Clifford, J. in Higueras vs. United States, 5 Wall., 827, 835.

"It is a *universal* rule that course and distance yield to natural and ascertained objects."

Swayne, J. in Co. of St. Clair vs. Lovingston, 23 Wall., 46, 62.

The rule is also stated in unqualified and absolute terms in the following cases:

M'Iver's Lessee vs. Walker, 9 Cranch, 173, 178.
Morrow vs. Whitney, 95 U. S., 551, 555.
Gerrard vs. Silver Peak Mines, 82 Fed., 578, 585.
Nelson vs. Hall, 1 McLean, 518. (Fed. Cas. No. 10107).
Koons vs. Bryson, 69 Fed., 297.
Robinson vs. Moore, 4 McLean, 279. (Fed Cas. No. 11960).
Kirwan vs. Murphy, 83 Fed., 275, 278-9.
Jones vs. Martin, 35 Fed., 348.
Ellenworth vs. Standcliff, 42 Fed., 316.
United States vs. Murrey, 41 Fed. 468.
Whitehurst vs. McDowel, 53 Fed., 633.
McDowel vs. Whitehurst, 47 Fed., 757.
Same Sase, 103 Fed., 157.
Same Case, 109 Fed., 354-5.
Belden vs. Hebbard, 103 Fed., 532 at 541.
Ex-Party Davidson, 57 Fed., 883.

The rule, consistently with these unqualified statements of it, has been repeatedly enforced by this court, in cases involving larger discrepancies than in the case

at bar, and as large as are likely to occur within the range of actual experience.

Thus in *Newsom vs. Pryor's Lessee,* 7 Wheat., 7, one of the boundaries was described as running "south eight hundred and ninety-four poles to a stake crossing the river." It turned out that in order to cross the river, this distance must be increased to twelve hundred and twenty-two poles, an excess distance of more than a mile.

The discussion of this discrepancy by Chief Justice Marshall is worthy of quotation. It is as follows:

> "The distance must be disregarded, and this line so run as to cross the river, or the distance must control the call for crossing the river. These difficulties have occurred frequently and must be expected to occur frequently where grants are made without an actual survey. *Some general rule of construction must be adopted; and that rule must be observed,* or the conflicting claims of individuals must remain forever uncertain.
>
> "The courts of Tennessee, and all other courts by whom causes of this description have been decided, have adopted the same principle *and have adhered to it.* It is, that the most material and most certain calls shall control those which are less material, and less certain. A call for a natural object, as a river, a known stream, a spring, or even a marked tree, shall control both course and distance. These decisions are founded on two considerations. Generally speaking, it is the particular intention of the purchaser to ac

quire the land lying on the stream called for, as being more valuable than other land; and, in every case where a natural object is mentioned, it designates the land surveyed had there been an actual survey, much more certainly than course and distance can designate it. In this case, for example, the surveyor says that he has run south 894 poles, to a stake crossing the river. Now, it is much more probable that he should err in the distance, than in the fact of crossing the river. The conclusion, therefore, had an actual survey been made, would be, that the line did cross the river.

"The general effect of this principle undoubtedly is, that the purchaser acquires more land than is expressed in his grant, and more than he has paid for. Where this has been thought an object worthy of legislative attention, provision has been made for it. Courts cannot now shake a principle so long settled, and so generally acknowledged."

Yet after the lapse of another century the learned counsel for these respondents think they can shake it in a case involving a slighter discrepancy. In the Newsom case the single discrepancy between the distance and the natural monument named in definition of the second line of the survey, resulted in adding to the estimated contents of the granted tract about seventeen hundred acres of land lying in a strip a mile wide and about two and two-thirds miles long. It will be observed that the decision is distinctly placed, upon

the ground that the general rule *must*, as a matter of course, be observed. *Indeed this court has never supported a monument upon any other ground.*

In *Ayers vs. Watson*, 113 U. S., 594, there was a *discrepancy of about a mile and a half*, and it was declared by the court that the monument must control if capable of being identified. (P. 602).

In *Land Co. vs. Saunders*, 103 U. S., 316, a boundary line was described as "beginning at the northeast corner of the Town of Lincoln and running east seven miles and one hundred and seventeen rods to Hart's location; thence southerly by the western boundary of said location," etc. The first mentioned line, in order to reach Hart's location would have to be lengthened something over a mile beyond the distance stated in the deed. The case against the monument was skillfully presented by able counsel, and the claim of Hart's location to recognition as a monument, was complicated by the fact that the location was a tract nominally only seven miles in length, but really covering thirteen miles upon the ground, the side lines of which had never been definitely located or marked, and were involved in manifest uncertainty. In the opinion of the court, the magnitude of the discrepancy is not treated as presenting any question for discussion. The debatable question was, whether the invisible and unlocated side line of Hart's location, which could be

ascertained only with great difficulty by recourse to the courses and distances specified in the Hart patent, could be regarded as constituting a monument. That question having been determined in the affirmative, the rule in favor of monuments was treated as absolute, and it was declared by the court, speaking by Bradley J.:

> "Hart's location is called for, and to that location *we are bound* to go."

We are not aware that litigation ever arose, directly involving the boundaries of Hart's location. The statement above made as to the discrepancy of six miles in its length, is based upon facts appearing as matters of general history, in the briefs in the Saunders case. The facts concerning that location as there disclosed, however, furnish a very interesting and impressive illustration of the intrinsic force of monumental boundaries. The location was described as beginning at the tract of land granted to Vere Royse, and running in a generally northerly direction, by specified courses and distances, "until it meets the notch or narrowest passage leading through the White Mountains lying upon Saco River." The *termini* being thus unmistakably fixed by monument, no doubt appears to have ever been raised, that the location must be construed to include all the land between the

monuments, although the distance was six miles greater than specified in the deed.

In *Chinowcth vs. Haskell's Lessee,* 3 Pet., 92-98, there was a discrepancy of some four thousand feet between the distance specified and the point where the monument was claimed to be. The alleged monument having been held incapable of identification, the distance was allowed to prevail, but it was distinctly conceded that the result would have been otherwise if the monument had been found. The court, speaking by Marshall, C. J., (p. 98) said:

> "If the grant in this case had called for two small chestnut oaks marked as a corner to Robert Young's survey of one hundred thousand acres (an adjoining survey), the mistake in the course and distance would not have prevented the line from being run from the corner at D. to the chestnut oaks."

In *Horne vs. Smith,* 159 U. S., 40, at pages 40, 43, it seems to have been the intention of the court to concede that the boundaries would have extended to Indian River, a mile or more beyond the specified distance, if that river had in fact been the body of water upon which the survey terminated. The case went off on the fact that the water actually encountered by the surveyor was not Indian River, as he supposed, but a bayou running parallel to it, which he misnamed.

In *Mitchell vs. Smale,* 140 U. S., 406, hereinafter cited in connection with other meander line cases, the supremacy of a lake as a monument was enforced, although the area of the patented lot was increased six fold over the indications of course and distance.

To the same effect are the state decisions.

In *Simm's Lessee vs. Baker,* Cooke, (Tenn.) 146, (A. D., 1812), the call was for Duck River, and the distance gave out a mile and eight poles before reaching it. The court by McNairy, J., sustained the call for Duck River, remarking that the discrepancy was not so great as in many cases where the rule had been adhered to. "Indeed," he added, "so far as my knowledge on the subject extends, *no instance has occurred where the courts have been guilty of a departure from the rule.*"

So in *Whiteside vs. Singleton,* Meigs, (10) 207, 218, 219, the monument was held to prevail, although as appears from the statement of facts in Overton's heirs vs. Cannon, 2 Humph., 264, 266, involving the same grant, the discrepancy amounted to eighteen hundred acres on a grant of five thousand.

So in *Fowler vs. Nixon,* 7 Heisk, 719, 724, (A. D., 1872), the discrepancy between monuments and distances, was such that to recognize the former would increase to fifteen thousand acres, a grant which, according to the latter, would cover only two thousand

acres. The monuments were sustained, and the court said:

> "Nor can the defendant object to the grant because it contains fifteen thousand acres instead of two thousand acres. The law is well settled that a natural object such as a river, will control a call for distance. Hence when the third line calls to run nine hundred poles to Duck River, the line must be extended to Duck River even though in so doing much more land is embraced than the grant calls for."

So in *Sturgeon vs. Floyd,* 3 Rich., 80. The supremacy of the monuments was enforced although they enclosed one hundred and thirty-six thousand acres, while the courses and distances covered less than fifteen thousand acres.

So in *Simpkins Admrs. vs. Wells,* (A. D., 1897), 19 Ky., L. Rep., 881, a line described as twnety poles in length was recognized as extending 141 poles to the designated monument.

So in *Pitman vs. Nunnelly,* 17 Ky. L. Rep., where the courses and distances called for only a third as much land as the monuments did, the latter were sustained.

So in *Prest. et al. vs Clark,* 31 N. C., (9 Ired.) 58, 59, the main question was whether the patent should be construed as calling for a lake as a monument. The court said:

"Then if the third line here, instead of being described as 'north eighty poles,' had gone on further, 'to the lake,' there could be no scruple in extending the line to the lake, though it be three or four times the distance."

The ambiguity was resolved in favor of the lake as a monument, and the line extended accordingly.

The principle is uniformly recognized in the Minnesota cases.

Turnbull vs. Schroeder, 29 Minn., 49, 51.
Nicolin vs. Schuerderham, 37 Minn., 63.
Chan vs. Brandt, 45 Minn., 93.

There is another line of cases, which, while involving discrepancies of less magnitude than the foregoing, admirably illustrates the conclusive force of the rule as a principle of interpretation. They are cases in which monuments were enforced against the courses and distances although it appeared with exceptional distinctness that the result was to pass more land than the parties had designed. Such, for example, is the case of *Pringle vs. Rogers,* 193 Pa. St., 94, 98, (A. D., 1899), where an administrator confessedly intended to sell an entire tract. The courses and distances included the entire tract,—the monuments only a part. It was held that the monuments must prevail. The court's discussion of the subject seems worthy of reproduction in full. It was as follows:

"Here, the parol evidence showed a mistake by somebody, when the unambiguous description was applied to the marks on the ground; in two instances, the lines were shorter than in the deed, when the monuments called for were reached; either the lines were erroneously measured or erroneously written, or the monuments called for were not at the end of the measured distance; this was a mistake collateral to the deed. Either the monument must be disregarded or the lines shortened. What should be judicial decision in such dilemma? The court below conceded that as a rule the monuments on the ground must control the distance, but said in substance that if the jury could not locate all the lands shown by the record to have been conveyed, then they were at liberty to disregard the monuments and locate the land by the distances. This, we think, was a flat reversal of a well established rule; it put the measurements as the controlling fact, instead of a fixed, conspicuous, enduring monument on the ground. The rule is a very ancient one. As early as 1818, in *Hall vs. Powell*, 4 S. & R., 456, Duncan, J., said regarding it that it had been many times settled, and the 'law had ever been so held.' This court has since strictly adhered to it. Hundreds of thousands of acres of land in this commonwealth are now held because of the judicial enforcement of it; for it is a well known fact that but few of the recorded distances of the early surveys were afterwards found correct, when run between the monuments on the ground. Today owners of land under deeds which have not been the subject of judicial interpretation rest secure in the conviction

that their boundaries are determined by the monuments on the ground. The legal profession understand the rule to be so irrevocably settled that they do not counsel litigation in the face of it. True, in our courts, it was probably first applied in determining disputes under original surveys, and these have been the subject of its application since in the large majority of cases; but the reasons on which it was founded were just as persuasive in impelling its adoption in disputes concerning the innumerable divisions and subdivisions of land as in those resulting from original surveys. It is one to which less uncertainty attached than to any other. It was not framed because mistakes occurred, only from mismeasurement of the surveyor, or carelessness of the scrivener in recording the distance, but because experience and observation had demonstrated that the surveyor or enginer was less likely to mistake by sight and record the monument at which he stopped than his measurement and computation of the distance. There is nothing in the facts of this case which takes it out of the operation of the rule. We concede that the administrator, probably, intended to sell this strip of land as part of the Schooley tract. We infer this intention, because his petition for sale averred that the sale of all the lands of decedent was necessary for payment of his debts, and because it was his duty to sell all; but it is as clear as express descriptive words and undisputed monuments can make it, that he did not sell this strip to anybody. We think he ought to have sold it; the court below and the jury thought so too; they gave effect to their view of his duty by

rendering judgment that he did that which he ought to have done. Neither we nor they dare tamper with a rule on which rests the security of titles, a rule which Duncan, J., declared had ever *been the law.*

"Besides, the purchaser was bound to see before final confirmation of the sale, that the quantity of land she thought she was buying was embraced in the boundaries of her deed, as the law fixed it by the monuments on the ground. The orphan's court, being a court of equity, would then, on complaint by her, without doubt, either have relieved her of her bargain or have enlarged the description so as to accord with her belief as to quantity. But, having accepted her deed and paid her purchase money years ago, caveat emptor must apply now, when, in effect, she sets up a deficiency in quantity as warranting her in holding possession of more land than was conveyed to her. Sackett vs. Twining, 18 Pa., 199.

"We agree entirely with the argument of counsel for appellee that where the record of writings constituting a conveyance, when taken altogether, on their face, show an ambiguity in the description evidence aliunde may be resorted to to determine what was intended to be embraced in the deed, and all the authorities cited by them sustain the argument; but there is no decision of this court that ever countenanced a disregard of the unmistakable monuments on the ground, to carry out a conjectural intention of the parties to convey more land than that embraced in the description; and this intention to be found in

great part, too, by a jury from records and written documents."

So in *Johnston vs. House,* 2 Hayw., (N. C.) 301, (A. D., 1804), a surveyor after locating one corner by a *red* oak, found he had included too much land and thereupon marked a *white* oak at a distance of eighty poles instead of the 160 poles marked by the red oak. The patent called for eighty poles to a red oak. It was held that to the red oak the line must go, so far as mere interpretation was concerned. The case was cited approvingly in *Deaver vs. Jones,* 119 N. C., 598, 600.

So in *Gilman vs. Riopelle,* 18 Mich., 145, 164, even under the stringent rules as to clearness applicaple to divestment of title by tax sale, a description by monument was held by the court per Cooley, C. J., to carry an 80 acre tract although only twenty acres were called for by the deed.

Such cases as these suggest, as is undoubtedly the fact, that the logical relation in which the courses and distances stand toward the monuments is almost exactly identical with the relations sustained by specifications of quantity. Concerning the latter the authorities are equally uniform that the monuments must prevail.

Barclay vs. Howell's Lessee, 6 Pet., 498.

Thus in the old case of *Willoughby vs. Foster,* Dyer 80 b., a deed of "all my meadows in D. containing 10 acres" was held to carry the 20 acres actually covered by the meadow.

So in *Llewellyn vs. Earl of Jersey,* 11 M. & W., 183, 188, specifications of quantity were in the absence of monuments ignored in favor of boundaries fixed by a plat drawn to a scale.

In *Reddick vs. Leggat,* 7 N. C., 539, 544, it is said *arguendo,* "I grant to J. S. 1000 thousand acres of land, and no more, bounded as follows, etc., and 2000 acres are enclosed in the lines. The 2000 acres pass, as the butts and bounds are more certain than quantity, which depends upon measurement and calculation; and the quantity is in no way material except as to lands where the boundaries are doubtful, and there it may be thrown into the one scale or the other according to circumstances."

No matter how specific may be the intention to convey only a given quantity, the monuments will prevail against it.

Chandler vs. McCard, 38 Me., 564.

So in a contract for "the south 100 acres of lot 15, beginning at the southeast corner, and run by the surveyor 100 acres exactly," the *principle feature or*

substance of the agreement, is not for the south 100 acres, but for the tract run by the surveyor."

11 U. Can. Q. B., 631.

This is the ground substantially, upon which as pointed out by Mr. Rawle in his work on covenants, it is held that covenants of title have no reference to the quantities specified in the deed. The *subject matter* of the conveyance, is the land enclosed by the monuments be it more or less. *Rawle on Covenants,* (5th Ed.) Sec. 297. „

In Canada, monuments are as absolutely supreme as with us. In *Dunn vs. Turner*, 3 U. C., Com. Pl., 104, Macauley, C. J., in supporting the monuments in a case of substantial discrepancy, remarked that he was not prepared to say that it would make any difference though the monuments were such as to reduce the land to a fourth or even an eighth of the area covered by courses and distances.

So in *Doe Dem. Murray vs. Smith,* 5 U. C., 225, 226, it was said:

> "If the crown makes a grant with a description, which according to visible boundaries, natural or otherwise, does clearly embrace certain lands, then those lands *must* pass, and the patentee *must* be allowed to hold up to the specific fixed boundary mentioned, provided the crown had a right to grant the land thus described."

It is further to be observed that when this rule in favor of monuments has passed into legislation, it has been without qualification. Thus section 2077 of the California Code of Civil Procedure provides as follows:

"When permanent and visible or ascertained boundaries or monuments are inconsistent with the measurement. either of lines, angles or surfaces, the boundaries or monuments are paramount." The like rule, which indeed, is identical with that embodied from their foundation in the statutes regulating our national surveys, was enacted in North Carolina as early as 1715 as is noticed in *Prest. etc. vs. Clark*, 31 N. C., 58, 59. It was there directed that in rerunning the lines of a survey "the surveyor shall proceed by marked trees, if the same can be found, or by natural boundaries, if any mentioned, and if there be not marked trees, then he shall follow the courses mentioned in the patent, so as the intention of the party first taking up the land may be observed as near as may be."

SECOND POINT.

The rule of monumental supremacy when viewed in the light of its true reason, is seen to be necessarily a universal rule of interpretation.

Its *reason* is, that the description of land by reference to monuments, imports that the very thing

and the *only* thing intended to be dealt with, is a defined tract, segregated by visible marks from the surrounding land. This, in every case, is as literally true, as though the land had been isolated by wall or trench instead of by the customary marks made or adopted by the surveyor. In principle every conveyance by visible mark or monument, is like the conveyance of an island, of a given number or name. Who can conceive of the operation of such a conveyance being contracted or expanded by clauses descriptive of the acreage of the island, or of the lengths and courses of its shores?

> "A survey is made to inclose a tract of land by a visible line."
>
> Williams J., in Grier vs. Penn. Coal Co., 128 Pa. St., 79, 95.

If the presence of the courses and distances in a deed, could only be accounted for upon the hypothesis that they were inserted as an independent, competitive description of the land conveyed, it might be necessary to assume that the parties, however unhappily, intended to thus to bring confusion upon their grant. But, of any survey, it is of course incumbent upon the surveyor to preserve notes, telling what kind of marks he has made or adopted, and as nearly as practicable, where they can be found, the salient features of which notes may be set out in the conveyance.

Where to look for marks or monuments can only be definitely told in terms of course and distance, and it is for this purpose solely, that those terms are introduced into a conveyance of a surveyed or demarkated tract.

After the expense of a survey has been incurred in order to make possible a sale by visible bounds rather than by imaginery lines, could anything be more irrational than to impute to the parties an intention to undo the survey, and remit themselves back to imaginery lines, merely because they have spread upon the face of the conveyance, in terms of course and distance, a description of the location of the segregating monuments? That would be to convert into an engine for the destruction of the monuments, clauses which were designed only to identify and perpetuate them.

That the parties to a sale of land which is described by reference to a particular survey, contemplate the conveyance of the visibly defined tract which by that survey was marked off, is under any ordinary circumstances a matter of legal intendment. Any contrary supposition is conclusively rebutted by the circumstance that *it was to avoid the necessity for conveying by imaginary lines,* that the surveyor was employed to make or adopt *real* ones.

Are courses and distances combined with monuments in the description of land, because the parties

are in doubt whether the subject matter of their contract or conveyance is the entity identified and limited by the monuments, or whether it is the other entity identified and limited by imaginary lines, and because they wish to postpone the question, for conjecture by court or jury? It may be said that both kinds of boundary are referred to upon the supposition that, the survey having been exact, the two are identical. But the suggestion is unfounded in fact. The inaccuracy of surveys is proverbial, except where conducted over small areas under the most favorable conditions, by the most skilled surveyors. Nothing can be imagined which would entail more distraction upon boundaries than the judicial erection of courses and distances, (which, as already noticed, are introduced into the deed or patent merely as a part of the description of the monuments), into an independent and competitive and habitually inconsistent description of the thing to be conveyed.

If, in order to break the force of the fact that the parties intend to convey the land enclosed by the monuments, it is said that they also intend to convey a tract of given dimensions or quantity, the answer is, that this latter, is not an intention which is competitive, or from a legal point of view, concurrent, with the intent to deal with the visibly segregated tract,—(which is always the immediate or final intention); but is remote, collateral or inducing matter. *Every*

survey which is made the basis of a conveyance, has within it the elements of an arbitrament of the courses and distances; so that *finally* the transaction has reference only to the tract *which,* not absolutely, but only *according to that survey,* is of the specified dimensions.

It was mainly in connection with public land surveys in America during the Colonial period and the immediately ensuing decades, that descriptions embodying references to course and distance came into vogue. They appear to have been practically unknown in European conveyancing. Scarcely half a dozen cases involving such descriptions appear in the English reports down to the present time. In thickly settled communities where nearly every tract has a name, or a well defined occupancy, or a defined chain of title, or bordering streets or roads, or immemorial adjoiners, or well known natural objects, reference to which can be incorporated in descriptions, and where there is a teeming population in whose knowledge and memory these, and the artificial monuments referred to, will find lodgment and preservation, it is unnecessary to point out mathematically where the monuments are to be looked for. But in the trackless woods of America the settler or purchaser who undertook to give publicity to his boundaries was confronted with different conditions. His wilderness monuments would be hard to find and easy to lose. This was the exigency which

gave rise to the custom of *describing the location of the monuments* as well as the monuments themselves. The Colonial population were of a race which had been in the habit of bounding and sub-dividing its lands by creeks, rivers, marked trees, blazed lines, mounds, stones and stakes, substantially upon the methods embodied in our public land legislation, for too many thousands of years, to justify the supposition that they planned their abandoment in favor of imaginary lines.

Ross's Early Land Holding Among the Germans, 13, 149, 150.

The system of surveys finally established by Congress may be said to have had four ends in view: To mark off the public lands into tracts of convenient size and symetrical form by monuments of traditional sorts, ready for individual purchase or occupancy: to determine the number of acres for which the purchasers of the several tracts should be charged: to supply the necessary data for a plat or picture of the lands as enclosed in and defined by their natural and artificial monuments or boundaries, by reference to, and in reliance upon which, purchases might be made; and to perpetuate notes of course and distance, which would be a guide to subsisting monuments, and a means of approximately replacing those impaired by lapse of time. Not to supersede but to fortify and elaborate the traditional system of boundary by monu-

ment, was the unmistakable policy of the legislation. The roughness and inaccuracy of the surveys, particularly in remote, uneven and densely wooded regions, was, however, and always has been, a matter of the utmost notoriety. The legislation and the Department regulations based upon it as well as the judicial decisions; bristle with assumptions of discrepancy between monuments, and courses, distances and quantities, as matters of course. Thus the statute has always provided for these anticipated discrepancies as follows:

> "All the corners marked in the surveys returned by the surveyor general, shall be established as the proper corners of sections, or subdivisions of sections, which they were *intended* to designate. * * * The boundary lines, actually run *and marked* in the surveys returned by the surveyor general, shall be established as the proper boundary lines of the sections, or subdivisions, for which they *were intended, and the length of such lines, as returned, shall be held and considered as the true length thereof.*"
>
> Revised Statutes, Sec. 2396.

Always and everywhere,—certainly under the national system of surveys, the *essence* of the surveyor's function is not measurement or computation but *demarkation;* not to run his lines in the air but to mark them upon the ground, where so long as they can be

identified they are without competitors. That this is so, is recognized by the Department regulations which embrace the following paragraph, the italics being in the original:

> "Establishing Corners. (1) To procure the faithful execution of this part of a surveyor's duty, is a matter of the utmost importance. After a true coursing and most exact measurements, the establishment of corners is the consummation of the work. Therefore, if the corners be not perpetuated in a permanent and workmanlike manner, the *great aim* of the surveying service will not have been attained."
>
> The Public Domain, (A. D., 1883), p. 590.
> Williams J., in Grier vs. Penn. Coal Co.,
> 128 Pa. St., 79, 95.

The world still worships at the shrine of Terminus; landmarks are still sacred. And with the best of reasons, unless we are content to convert our landed possessions into *floats*, to be wafted about by each succeeding surveyor who claims to have applied more accurately than his predecessors, the specified courses and distances from the nearest principal meridian; if indeed those meridians themselves are not also to be loosened from their monumental moorings.

We say then:

(1) *That it is impossible to account for the combination of course and distance with monu-*

ments in patents, plats or deeds, upon the theory that the parties have fatuously or inanely assumed that the tract enclosed by the monuments will prove to be identical with that enclosed by the imaginary lines.

(2) *That it is equally impossible to suppose that the parties, foreseeing a discrepancy between the marked and the imaginary lines, have deemed it conductive to a good understanding to insert them both as independent and competitive description to contradict and discredit each other.*

(3) *That the key to the combination lies in the fact that course and distance are incorporated only as clews to the location of the monuments.*

(4) *That they never purport to be abstract or absolute courses and distances, but are returned by the surveyor as merely the courses and distances which appear to exist between the monuments, according to the measurements which he made. How, therefore, could his report of the distance be accorded precedence over the actual distance on the ground?*

(5) *That in no instance whatever do the courses and distances take effect as directly descriptive of the land, or otherwise than indirectly through the monuments, by identifying them while*

they last, and approximately relocating them when lost.

(6) *That whatever other reasons there may be for it, the universality of the rule in favor of monuments, is thus necessitated by the fact, that so long as the monuments can be found, there is no competitive description of the land.*

(7) *That although in a case of conflicting monuments, courses and distances may perform their legitimate function in identifying the true and rejecting the false; and although a monument impossible of application is no monument at all; and although mere mistakes of expression respecting monuments, (as by the giving of a wrong name to an object) may be corrected by interpretation; the fact remains that however wide the discrepancy, if monuments intentionally adopted are impeached for error only because they are more distant from each other, and so inclose a larger area than intended, the error, for all purposes of mere interpretation, is in the distance and not in the monument, and is error relative to a remote and collateral matter...If the discrepancy is so extreme as to demand some form of relief, it must be sought through reformation in equity, where all questions of intention, estoppel in pais, etc., can be fully investigated, and the relief adapted to the equities of the particular case.*

The authorities supporting these propositions are abundant.

In *Blasdell vs. Bissell,* 6 Pa. St., 258, boundaries had been marked under a parol contract for the sale of land. The deed, which was executed some years later, described the property by courses and distances, which varied from the boundaries as marked. It was held that the marked boundaries must prevail, and the reasons assigned by Chief Justice Gibson were as follows:

> "When a tract of land has been surveyed for a warrantee, by courses and distances subsequently called for in a patent for it, the lines actually traced on the ground, as shown by the landmarks, and not those produced by the courses and distances, constitute the boundaries of the grant; and why should they not constitute the boundaries of a grant by an individual? The certainty of result produced by the rule, and the convenience of it, are alike reasons for its application to both; or perhaps they operate more forcibly for its application to the latter in proportion to the difference of value between wild and cultivated land. The calls of a survey, and not its courses and distances, are to govern; and where there are actual lines of demarkation, *the compass and chain are no more than instruments to point them out.* Where they are not to be found, the results obtained by actual survey are the next best *evidence of their location.* The mischiefs of a system adopted in an adjoining

state, where courses and distances are everything, and landmarks nothing, have induced us to cling to our own in all cases. Carelessness of chain-carriers, roughness of surface, variation of the compass, imperfection of the instrument, unskilfulness in the use of it, and other causes not to be enumerated, inevitably produce, in every instance, more or less uncertainty of result; and if we suffered ourselves to be governed by the compass and by measurement, collisions would be incessant."

In *Cox vs. Couch,* 8 Pa. St., 147, 154, which involved a discrepancy between monuments and distances, the rule in favor of the former was declared to be *invariable,* and the court, speaking by Chief Justice Gibson, said:

"It is a principle of construction, that where land is described by courses and distances, and also by calls for adjoiners, the latter, where there is a discrepancy, *invariably* govern; and it is as applicable to conveyances, and as it is to official surveys. By reason of imperfection of instruments, as well as inequalities of surface and carelessness of assistants, extreme accuracy is not to be attained by the compass and chain; while, on the other hand, calls for natural objects, or, what is much the same, known and established lines of contiguous tracts, admit of perfect certainty. When a vendor, therefore, conveys by established landmarks, the subject of the grant will neither overrun nor fall short of them. They form the

true boundary, *and the courses and distances serve but to point towards the place.*"

This statement of the rule was approved and followed in *Wood vs. Appal,* 63 Pa. St., 222.

So in the earlier case of *Yoder vs. Fleming,* 2 Yeates, 311, (A. D. 1798), it is said:

> "Natural and artificial boundaries of the survey have uniformly prevailed over courses and distances * * * *The lines actually run on the ground are the true survey and appropriation of the land contracted for,* but the *return* of survey is only *evidence* thereof, and shall be controlled by the actual survey."

This case was cited and followed in *Hall vs. Powell.* 4 Serg. R., 456, 461, (A. D. 1818), where the court said:

> "In this state the natural and artificial boundaries, the monuments described as the boundaries and limits of a survey, in general form the *only evidence* of a survey. To these limits, thus returned, the survey extends, *whatever* may be the courses and distances expressed in such return; and this is the common law of the land. If unbroken usage and a uniform course of judicial decision make the law, then this was properly decided by the court to be a general rule of property."

The foregoing expositions of the reason of the rule by Chief Justice Gibson, derive an especial interest and value from the fact that the central position of Pennsylvania, her acknowledged precedence in development of a public land system, and the holding of the early sessions of Congress at Philadelphia, resulted in the exercise by her land system of a very marked influence upon that of the United States.

Public Domain, p. 468.

The same views had, however, long before been expressed by the North Carolina court, speaking by Henderson, J., in *Doe vs. Paine*, 4 Hawks, 65, 71, (A. D. 1825). It was there said:

> "Where natural objects are called for as the *termini*, and course and distance and marked lines are also given, the natural objects are the *termini*, and the course and marked lines *can only be resorted to by the jury to ascertain the natural objects. When the natural object is unique or has properties peculiar to itself, these boundaries or guides can have but little effect, in fact, I believe none.*"

So in the earlier case of *Cherry vs Slade's Administrator*, 3 Murphy, 82, 86, (A. D. 1819), in a very able opinion Taylor, C. J., declared that the first rule in construing a description of land is that:

"Whenever a natural boundary is called for in a patent, the line is to terminate at it, *however wide of the course called for it may be, or however short or beyond the distance specified.* • • • A natural boundary is fixed and permanent, and its being called for in the deed or patent *marks beyond controversy the intention of the party to select that land from the unappropriated mass.*"

So in *Deaver vs. Jones,* 119 N. C., 598, 599, it is said:

"A deed is a contract, and the *highest evidence* of the identity of the subject matter of it, is proof of the consent of two minds that certain marked lines or quarters corners should constitute the boundary."

So in *Miller vs. White,* I N. C., 223, 226, (A. D. 1802), in applying the general rule that monuments prevail, the court said:

"If it were intended to be bounded by the distance, why refer to the line of another tract? Why not mark a tree at the end of the distance if it is really surveyed, or specify the distance only if it's only platted?"

So in *McClintock vs. Rogers,* 11 Ill., 279, 296, (A. D. 1849), the court by Caton, J., expressed, although in different language, substantially the same theory of

the rule that is announced in the foregoing Pennsylvania and North Carolina cases. It was said:

> "All agree that courses, distances and quantities must always yield to the monuments and marks erected or adopted by the original surveyor, as indicating the lines run by him. These monuments are *facts;* the field notes and plats indicating courses, distances and quantities, are but descriptions *which assist in ascertaining the facts."*

It was perhaps at the hands of Chief Justice Bibb, however, in his opinion in 1828, in the Kentucky case of *Baxter vs. Evett's Lessee,* 7 Mon., 329, that the *principle* of this subject received its most exact and succinct expression. He there said:

> "The *courses and distances* specified in a plat and certificate of survey, *are designed to describe the boundaries as actually run and made by the surveyor, and to assist in preserving the evidence of their local position, to aid in tracing them while visible, and in establishing their former position in cases of destruction by time, accident or fraud. As guides for these purposes, the courses and distances named in a plat and certificate of survey are useful. But* a line or corner established by a surveyor, in making a survey upon which a grant has issued, can not be altered because the line is longer or shorter than the distance specified, or because the relative bearings between the abuttals vary from the course named in the plat and certificate of survey. So, if the line run by the surveyor be

not a right line, as supposed from his description, but be found by tracing it to be a curved line, yet the actual line must govern; *the visible actual boundary, the thing described*, and not the ideal boundary and imperfect description, is to be the guide and rule of property."

It will be observed that the four courts whose expositions of the principle of the superiority of monuments are above quoted, while severally approaching the subject without particular reference to each others views, each formulating the principle in phraseology of its own choice, concur in substantially the same view, to-wit: That the logical relation sustained by the monuments toward the identity of the thing conveyed is *fundamentally* different from that which is sustained by the specifications of course and distance; that the monuments enter directly into the identity of the land in ways that the courses and distances do not; that it is merely to identify and perpetuate the monuments that the courses and distances are given; that the thing of which the courses and distances are descriptive, is the visible monumental inclosure which segregates the land; that the issue, is as to the force and validity of the attempted description, as against the visible entity which it was intended to describe; that for two reasons, the monuments cannot be overridden by the courses and distances; (1) that courses and distances are introduced only because recourse to such terms is the

only available method of accurately describing the location of the marked lines or corners of the tract which has been marked off as the visible subject matter of the conveyance; (2) that the specification of course and distance *never purports to have reference to absolute course or distance*, but only to *the course or distance which according to the measurements made by the surveyor appeared to him* to exist between the monuments.

The question is one which seems never to have been quite so minutely analyzed by this court as in some of the foregoing State decisions. The principal contributions to the doctrine of the court are the characteristically penetrating thrusts of Chief Justice Marshall in the early case of M'Iver's Lessee vs. Walker, 9 Cranch, 173, 178, by which he chiseled the subject into the form which it has ever since retained. He enunciated three propositions, each of them evidently as a matter of absolute legal intendment.

They were:

(1) "That all lands are supposed to be actually surveyed;" evidently meaning, all lands that are conveyed by combined reference to monuments, courses and distances; a survey being presupposed in such cases because the specification of courses and distances between monuments, imports that they have been measured.

(2) That "the intention of the grant is *to convey the land according to that actual survey.*"

(3) That *"consequently* if marked trees and marked corners be found conformably to the calls of the patent, or if water courses be called for in the patent, or mountains, or other natural objects, distances *must* be lengthened or shortened, and courses varied so as to conform to those objects."

It is thus made to appear, as he points out, that "the *reason* of the supremacy of monuments is, that it is the intention of every grant to convey *the land actually surveyed.*" It will be noticed that this is precisely the reason which we have assigned for the rule, and which is supported by all of the foregoing citations.

That this statement of the *reason* is correct, has been repeatedly recognized by the court, and was indeed elementary law in every colony during the Colonial period. It has always been the tract marked off, for which search has been made by the courts.

Ayres vs. Watson, 137 U. S., 584, 597, 598.
Chinoweth vs. Haskell's Lessee, 3 Pet., 92, 96.

In the recognition of that reason, the Rubicon was crossed.

That *reason* being once assumed or conceded, all

the deductions of the foregoing State decisions become incontestable. In that *reason* they are all securely wrapt up. That reason has its exclusions as well as its inclusions, and imports that it is *not* the intention of the parties to convey with reference to imaginary or mathematical lines. It means that when question arises as to the dimension or content of the visibly demarkated subject matter of the conveyance, the object itself, which constitutes that subject matter, is, with its marks upon it, the best evidence. The only rational explanation of the failure of the Chief Justice to thus elaborate his reasoning, is that from the intention to convey the tract visibly demarkated, the supremacy of its marks and monuments as evidences of its identity, seemed to him to flow as a consequence so obvious and necessary that no further account of the matter was called for. With characteristic acumen, he does indeed anticipate the only argument by which, this reason of the rule being conceded, it would be logically possible to parry any of the deductions which in the foregoing State decisions are drawn from it. He notices that even after the intention to convey the actually surveyed and marked tract is assumed, it might still be argued that in the *identification* of monuments there lurk dangers of mistake, which would equal or overbalance the probabilities of error in the surveyor's measurements, so that the latter should still be regarded as the better evidence of where

it was that the marks and boundaries were actually located by the surveyor. It was in response to such a contention as this, and in denial of it, that he made the following observation:

> "Mistakes in courses or distances, are more probable and more frequent, than in marked trees, mountains, rivers, or other natural objects capable of being clearly designated and acturally described. Had the survey in this case been actually made, and the lines had called to cross Crow Creek, the courses and distances might have been precisely what they are, it might have been impracticable to find corner or other marked trees, and yet the land must have been so surveyed as to include Crow Creek. The call, in the lines of the patent, to cross Crow Creek, would be one to which course and distance must *necessarily* yield."

On two other occasions the general subject was handled by Chief Justice Marshall. In Newsom vs. Prior's Lessee, 7 Wheat, 7, manifestly upon the theory of the universality of the rule, he applied it, speaking for the court, to cover an excess of more than a mile in distance and of about eighteen hundred acres in area. Again, as heretofore noticed, in the case of *Chinoweth vs. Haskell's Lessee,* 3 Pet., 92, he treated the rule as absolute, and declared that if the monument could be found, the line must be extended to it, though involving an excess of about 4000 feet above

the specified distance. *Land Company vs. Saunders,* 103 U. S., 316, and all the other cases cited under our first point, proceed manifestly upon the same view.

No adjudications of this court point in a different direction. *White vs. Luning,* 93 U. S., 514, relied upon by defendants, was a simple case of conflicting monuments, so that necessarily one must be rejected; and such a case illustrates ideally, the true function of courses and distances as identifiers of the true monuments. So with *Shipp vs. Miller,* 2 Wheat., 316, where the incompatibility was between a "buffalo road," and a "dividing ridge," and *Barclay vs. Howell,* 6 Pet., 496, 510, 511, where the conflict was between a street and a river as monument. Of a precisely similar type are the cases of *Cavazos vs. Trevino,* 6 Wal., 773, 785, *Ainsa vs. U. S.,* 161 U. S., 208, 209, *Lily's Admr. vs. U. S.,* 171 U. S., 220, 234-240, except that in those cases the monuments were defective not by reason of conflict with one another, but by reason of indefiniteness or destruction; and except that in those cases recourse was had principally to quantities rather than to courses or distances, to supply the monumental defects.

THIRD POINT.

The degeneration of the rule in particular jurisdictions.

In the State of New York and in Texas and Oregon which have followed her lead, the doctrine is really in ruins. It is indeed, still merrily proclaimed as a rule, but it's foundations have been taken away. The only basis that the rule ever had, was that assigned to it by Chief Justices Marshall, Gibson and Bibb, to-wit: that the thing intended to be conveyed, and the thing for which the courts are therefore searching, is the tract visibly demarkated by the surveyor. If there is to be a free-for-all guessing match whether in view of the facts of each particular case such ought to be deemed the intention of the parties, the monuments can claim no superiority until that question is decided. If the intention was to convey the tract actually marked off, the monuments are supreme; if the intention was to convey a tract bounded by imaginary lines of designated length and course, then the specifications of course and distance are supreme; if the legally efficient intent was to convey a given number of acres then the specifications of quantity must be supreme. What the New York courts have done is to open in each case a guessing match of this kind, by

denying that there is any legal construction or intendment that it is the visibly demarkated tract that the parties intend to convey. For many years it was held in that state as uniformly as anywhere, that monuments were universally supreme.

Jackson vs. Camp, 1 Cow., 605, 612.
Jackson vs. Frost, 5 Cow., 346, 349.
Jackson vs. Ives, 9 Cow., 661.
Cudney vs. Early, 4 Paige, 209, 212.

Also that they were unaffected by specifications of quantity, as where the premises were described as "containing 200 acres strict measure and no more."

Jackson vs. McConnell, 19 Wend., 175.

Afterwards by loosing sight as above mentioned, of the reason and foundation of the rule, they held that where the courses and distances coincide with designated quantity, their accuracy is verified, with the effect of denuding the monuments of their supremacy.

Baldwin vs. Brown, 16 N. Y., 359, 361.
Buffalo etc., Co. vs. Stigeler, 61 N. Y., 348, 351.
Higinbotham vs. Stoddard, 72 N. Y., 95, 99.
Danziger vs. Boyd, 21 J. & S., 398, 409.

What the New York court did was this: It dropped out of sight the foundation fact that where par-

ties convey with reference to the visible demarkations of an actual survey, it is a necessary legal construction, that it is the tract as demarkated that they intend to convey. They then naturally enough found that there was an open question of intention as to what it was that the parties did intend to convey;—whether a marked off tract, an ideally bounded tract, or a given number of acres. Assuming that this was the question requiring solution they justly enough concluded that the rule in favor of monuments ought to be regarded as very flexible indeed. The New York cases marking this fallacious departure will all be seen upon inspection to have been very peculiar cases. They should probably be regarded as having only a temporary tendency to becloud the subject in that state. The probabilities are that when the question is more squarely presented, the New York court will not fail to restore the rule to its true basis and full vigor.

In Texas, however, the rule has gone to irreparable ruin, with the result that the law of boundaries is there a jungle of contradictions, from which nothing but the arbitrament of a court or jury can rescue a boundary afflicted with discrepancies of this kind. It seems unnecessary to enter into the Texan labyrinth as there is a recent graphic and accurate description of it by McCormick, J., in *Blum vs. Bowman,* 30 U. S. App., 50, 54, where he cites the Texas cases and quotes from *Booth vs. Upshur,* 26 Tex., 64, 70, as follows:

"There is no law fixing the effect of any call found in a grant, or giving one more weight or importance than another. Therefore by merely looking at the face of the grant, which has several calls, the controlling call cannot be determined. * * * The lowest grade, * * * is made to prevail over the highest grade, * * * when upon applying the calls of the grant to the land, the surrounding and connecting circumstances show that course and distance is the most certain and reliable evidence of the true locality of the grant."

The situation is the same in Oregon, as is well illustrated by *Hale vs. Cottle*, 21 Or., 580, 585-6, where it is said, that *generally* the monuments will prevail "because the primary object in all such cases is to ascertain the location of the line actually *intended* by the parties. * * * But this is only a rule for construing the descriptive parts of a conveyance when the construction is doubtful, and there are no other sufficient circumstances to determine it, and is, therefore, not an inflexible rule in all cases. There are no fixed and certain rules by which the courts can be guided in determining this question, but it must be governed by that evidence in each particular case which carries conviction to the mind. * * * And if it appears from the face of the conveyance, in the light of surrounding circumstances, that the courses and distances, as given, correctly described the land

intended to be conveyed, they will of course prevail." The New York cases are cited, and it will be observed, that as with them, the business in hand is conceived to be, not the ascertainment of the demarkated tract, but the determination, whether it was the demarkated tract or something else which the parties *intended* to convey.

Prior to the decision of *Davis vs. Rainsford,* 17 Mass., 207, in 1821, the Massachusetts court had enforced, as consistently as any, the rule in favor of monuments.

Howe vs. Bass, 2 Mass., 380.
Pernam vs. Weed, 6 Mass., 131.

In the case last cited, the rule in favor of monuments was expressly declared by Parson, C. J., to be "a mere conclusion of law."

The Rainsford case was intrinsically one of the least possible significance, inasmuch as it was a simple case of *conflicting* monuments. It is the rule in Massachusetts, as generally elsewhere, that monuments in contemplation of the parties at the time of the conveyance, and soon afterwards erected, are of like force with those on the ground when the conveyance is made. In the Rainsford case, such a monument, being a building under construction, or about to be built, was referred to. It was promptly constructed, and the monument thus called for was inconsistent

with the line of another adjoiner, which by implication only, and not expressly, might be regarded as having been referred to. The conflict was solved by recognizing the former monument at the expense of the latter.

This is the first of a considerable line of cases throughout the country which illustrate how frequently it is that courts are so short-sighted that they can *feel* further than they can see;—cases in which courts having a feeling that the rule in favor of monuments ought not to apply, have held it inapplicable upon the theory of flexibility in the rule, whereas, they should have been able to see that the case presented was one of conflicting monuments, and one which, therefore, should be held to lie confessedly and entirely beyond the pale of the rule.

Parks vs. Loomis, 6 Gray, 467, was another case of conflicting monuments, as was also *Murdock vs. Chapman*, 9 Gray, 156, although in a more occult way. Indeed nine-tenths of the cases usually cited in evidence of the flexibility of the rule in favor of monuments, appear upon close examination to be indubitably cases of conflicting monuments. The significance of the Rainsford case lies not at all in the point adjudged, but in its announcement that the rule in favor of monuments is not inflexible. The court arrived at this impression precisely as the New York court had, by overlooking the fact that the intention

to convey the tract marked off by the monuments was a matter of necessary legal construction, and by improvidently assuming that the point of inquiry was, whether the parties intended to convey by reference to the monuments or by reference to imaginary lines.

It does not appear that in Massachusetts, any more than in New York the relaxation of the rule, for practical purposes, has extended beyond a very peculiar and narrow class of cases. Its principal local effect seems to have been to cast the formulas of the subject into such an unhappy state of confusion that the most illuminating account of the rule which the court is now able to give is that enunciated in *Hall vs. Eaton,* 139 Mass., 217, 221, where it is said:

> "The rule that monuments in a description in a deed, control courses and distances is founded on the consideration that that construction is more likely to express the intention of the parties. The intention to run a line to a fixed object is more obvious, and the parties are less likely to be mistaken in regard to it then in running a given distance or by a given course. But, where the circumstances show that the controlling intention was otherwise, the rule is not applied."

FOURTH POINT.

If by reason of the magnitude of the discrepancy or otherwise, the government is entitled to relief, it must be sought through reformation in equity.

With the doctrine of the supremacy of monuments properly understood and applied, *White vs. Burnley,* 20 How., 235, is an authority directly in point. In that case a grant of one league of land had been so surveyed and patented as to include two leagues, through the fraud or mistake of the surveyor. It was held that the only redress of the government would be in a suit for reformation. It may be argued that in the case at bar, because there is a discrepancy between monuments and distances, relief can be afforded by rejecting the former in favor of the latter, as a mere matter of interpretation. But this, as already pointed out, is precisely what is made impossible by the fact and the conclusive legal intendment, that it was the land inclosed by the monuments, that was intended to be conveyed; and by the fact that if this intention was induced by anterior mistake, the mistake was too remote to be cognizable in the ordinary course of interpretation. It is a mistake such as was held remediable only in equity, in *Lamprey vs. Mead,* 54 Minn.,

290,299. That was a case in which, the government surveyors, misled by the false appearances of a spring freshet, had meandered as a lake, a tract which should have been surveyed as dry land. Applying to the situation, the law of Minnesota, the effect was to clothe the purchaser of a lot abutting upon the supposed lake, with the ownership of the bed to the center of the lake, precisely as though the plat and patent had delineated the side lines of the purchased lot as extending to the center or thread of the lake. Such indeed was exactly the import of the plat and patent when read in conjunction with the law of Minnesota relative to the ownership in fee of the beds of unnavigable lakes. The contention there, was precisely as here, that the mistake of the surveyor was remediable by interpretation because the grant contained specifications of course, distance and quantity which would enable the court to cut the lot off at the meander line, thus awarding to the purchaser, the acres for which he had paid and no more, and lopping off that portion of the tract which by the mistake of the surveyor, had in legal effect, been included in the surveyed tract. The mistake was held remediable only through reformation in equity.

The survey in the case at bar was returned to the surveyor general and by him certified to the land offices as the basis for these patents; the complainant's lots were shown to extend from the north and

east lines of the section to the lake, and with the survey so returned as the basis of the patent, it is not competent for the courts to interfere except at the suit of the United States. From this point of view *Russell vs. Maxwell Land Co.*, 158 U. S., 253, 256-259, and *Cragin vs. Powell*, 128 U. S., 691, seem to be substantially in point.

Gazzam vs. Phillips, 20 How., 372, is also a very suggestive case in this connection. A purchaser of the southwest quarter of a certain section of land was there claiming that the court should by process of interpretation merely, construe his patent to cover the entire southwest quarter of the section as but for the mistake of the surveyors it would have been surveyed and platted; which would give him more acres than belonged to his fraction according to the plat. The lower court held that the "southwest quarter" should be construed to mean and include the land which should have been included in it. This court said:

> "This court is of opinion this ruling cannot be maintained. For conceding, for the sake of argument, that the plat by the surveyor general of this section was made contrary to law, the ground upon which the decision is sought to be maintained, that Etheridge, under the pre-emption act of 1830, was entitled to purchase the whole of the southwest quarter, and to have it surveyed and patented to him, yet it was not so surveyed, nor

did he purchase, nor has he obtained a patent for the same."

Of all the Federal cases, however, *White vs. Blum*, 52 U. S. App., 59, 63, is the most manifestly in point. The grant in that case had been so surveyed as to include an excess of 2000 acres. The contention there as here was that the error should be corrected by the subordination of monuments to distances. It was held that this result could only be obtained by reformation in equity. The case appears to be exactly in point.

The State decisions are to the same effect.

In *Sears vs. Parkers*, 1 Hayw., (N. C.), 126, the patent expressly stated that the land was sold as the confiscated estate of one McCulloch, from which it was evident that the remote intention was to convey only the land which had belonged to McCulloch. Apparently by mistake or design, the boundaries by which the tract was demarkated preparatory to its resale, as confiscated property, had been so extended as to include other adjacent vacant land. (P. 128). Although the confiscated land was in charge of different officers, from the state's general domain, it was held that the patent carried all of the land marked off by the monuments, and that relief if any, must be sought in equity. It will be observed that all of the facilities were present upon the face of the deed, to enable the court to make the desired correction, if it had been

deemed within the sphere of interpretation to override the final and immediate intention of the parties to convey the visibly enclosed land, by reference to conflicting intentions of a remote and inducing character.

Among other cases of similar import are the following:

Fowler vs. Nixon, 7 Heisk., (Tenn.), 719, 725.
Curle vs. Barrell, 2 Sneed, 66.
Pringle vs. Rogers, 193 Pa. St., 94.
Hull vs. Fuller, 7 Vt., 100, 105.
Owens vs. Rains, Hayw., (Tenn.), 106.

The last mentioned case was cited approvingly in *White vs. Burnley*, 20 How., 235, 247.

We do not desire to be understood as conceding that under the circumstances of this case the government, even in a direct suit for reformation, would be entitled to curtail the patented lots as proposed by the defendants. As shown under our fifth and sixth points there appear to be two insuperable objections to such relief in any forum. (a) The government is estopped by the express terms of the statute, from claiming that the monuments inclose more acres than returned by the surveyor (Rev. Stats. Sec. 23-96). (b) As a condition to *having* equity, the Government in such a suit would be required to *do* equity, and its relief would be restricted to compensation at the regular rates for the excessive

acreage. The equitable necessity for some such restriction, constitutes a substantive ground for holding the patent unalterable by interpretation merely.

FIFTH POINT.

The foregoing propositions are also established by the terms of the statute.

We confess our inability to understand upon what theory it is, that defendants argue this case distinguishable in their favor from some of our citations, because this was a statutory survey. From the foundations of the government every one of the foregoing conceptions has been deeply ingrained in the very letter of the statute. The scheme of the legislation has been to subdivide the public domain into townships and sections with lines so visibly marked and inscribed, in ways of which public records are preserved, that the boundaries of each section can be identified upon the ground, and followed by any one familiar with the methods of demarkation, as though each section were enclosed by a fence. (Rev. Stats. Sec. 23, 95).

To remove all possible doubt as to the force of the monuments, and to make it entirely clear that the

government is proposing to deal with each tract as it has been thus segregated by visible lines, and not otherwise, the following further provisions are made:

> "Sec. 2396. The boundaries and contents of the several sections, half-sections and quarter-sections of the public lands shall be ascertained in conformity with the following principles:
>
> "First. All the corners marked in the surveys, returned by the surveyor general, shall be established as the proper corners of sections, which they were *intended* to designate; * * * *
>
> "Second. The boundary lines, actually run and marked in the surveys returned by the surveyor general, shall be established as the proper boundary lines of the sections, or subdivisions, for which they were intended, *and the length of such lines as returned, shall be held and considered as the true length thereof.* * * * *
>
> "Third. Each section or subdivision of section, the contents whereof have been returned by the surveyor general, *shall be held and considered as containing the exact quantity expressed in such return.*"

All this means manifestly, as indeed has been held in every state of the union covered by national surveys, that the corners as actually marked, whether right or wrong, and the lines as actually blazed, whether straight or crooked, and the actual lines of waterways, etc., adopted as monuments by the surveyor,

whether accurately or inaccurately reported, constitute so long as they can be identified the sole evidence of the limits of the several tracts to which they relate. Not only so, but to establish the character of the survey as an arbitrament of courses, distances and quantities, the manifest purpose of the statute was to estop the government on the one hand and purchasers on the other, from being heard to claim as against each other in any forum, or for any form of redress, that the acreage actually inclosed by any set of monuments was in fact either greater or less than the quantity reported by the surveyor. The aim of the statute was thus, to preclude the government and all persons claiming under it, from alleging the discrepancy in distance and acreage, which the defendants as claimants under the government, are here putting forward as the sole foundation of their claim. We are not denying that the statute might be held inapplicable to a discrepancy brought about by fraudulent collusion between a surveyor and a proposed purchaser. But by nothing short of such collusion can the force of the statute be broken. The government causes these surveys to be made by sworn employees of its own choosing, and has wisely and deliberately adopted the traditional policy of binding and being bound by the demarkations actually made by them. So that by the very terms of the statute, the government, even in a suit for reformation could not be heard to allege the discrepancy

in acreage which would be its only pretext for asking relief.

It would be a wanton waste of labor to enter upon the citation of the multitude of cases in which this statutory subordination of courses, distances and quantities to the visible monuments of the survey, has been enforced. In view of its especial interest, we cite a single case, that of Ogilvie vs. Copeland, 145 Ill., 98, 105, in which the distance between the monuments was found to be only half as great as returned by the surveyor. The court said:

> "The government field notes give the distances from the northwest corner of section four, south, to the quarter corner on the west line of the section at forty chains, and from that corner to the southwest corner of the section forty chains; but evidence was given, on behalf of appellee, tending to show that the monument made by the government surveyors when surveying the section, at the quarter corner on the west side of the section, was only twenty chains and fifty-two links. If that is the fact, then so much of the field notes as assume to express the length of this line and the government plat of the survey is inaccurate. The field notes and plat are assumed to be correct, until the contrary is shown, *and they are important evidence in ascertaining where monuments are located;* but if the location of the monument is clearly shown by other evidence to be at a distance different than that given in the field notes and plat, they must give way."

SIXTH POINT.

The equities of the case.

(a). In the case of a water frontage as a monument, it is not only by its greater certainty, but by its greater materiality, that the monument is supported. The court will take judicial notice that the water boundary adds to the market value of a tract by augmenting its usefulness for almost any purpose, and will presume that it was one of the inducements to the purchase.

> "Generally speaking, it is the particular intention of the purchaser to acquire the land lying on the stream called for, as being more valuable than other land."
>
> Marshall, C. J., in Newson vs. Prior's Lessee, 7 Wheat., 7.
> County of St. Clair vs. Lovingston, 23 Wal., 46, 65.

(b). Experience shows that it is ordinarily only after the lapse of many years after the patenting of apparently riparian tracts, that interlopers come in and endeavor to insinuate themselves between the original purchaser and his waterway. The annals of

the courts so disclose. Such controversies do not arise until the original purchaser has for many years exercised ownership over the land, borne its burdens of taxation and otherwise, and in good faith built up expectations of enjoyment, the dissipation of which comports as little with good law as with good morals. It is unnecessary for us to remind the court how many of the most fundamental rules of our law, including the right of property itself, are traceable to the obvious injustice and impropriety of disappointing expectations of enjoyment naturally and reasonably formed, and long cherished. The men who upon technical pretexts seek thus to undermine titles unchallenged for a generation, by forcing themselves in between the government and its grantees, although they may masquerade under the denomination of settlers, belong unmistakably to a class of *"prowling speculators"* intent, not upon making a living by sweat of the brow, but upon making a fortune by the exercise of their wits. They appear upon the scene after the value of the property has been enhanced greatly beyond the price at the date of the patent,—often through the well directed industry or enterprise of the patentee.

It is a consideration of the first magnitude that the pronounced tendency of the views contended for by the defendants, particularly in connection with the meander line cases, is to place a premium upon cunning

and craft, to encourage the dissection of titles, to foment strife, and to disappoint natural and just expectations. The doctrines maintained by the complainant have a tendency, the opposite of all this.

(c). The positions of the complainant are powerfully supported by the principle of reciprocity. Every purchaser of land from the government, takes the risk of getting less land than the supposed acreage for which he pays, through carelessness in the survey or in the returns of the surveyor. While this is not peculiar to purchasers of riparian tracts, the hazard assumes an acute form in such cases.. Such carelessness or fraud as characterized the survey of this township, was as likely to leave these lots with only a fourth of their ostensible acreage, as to increase their acreage fourfold. Had three-fourths of each lot been in the water the loss would have fallen irrevocably upon the patentees. It will be recalled that very many of the rules of the law rest bodily upon this principle of reciprocity. It is for example, the most cogent of the reasons assigned for the doctrine of accretion.

(d). To allow the government to reclaim this land would be especially oppressive, since with full information, through sworn statements, that the interior of the township had not been actually surveyed, the Interior Department deliberately declined to have the survey investigated or corrected. (Finding 13, p. 60

and pp. 45-49 of Record). The government by its responsible representative, after being so notified, was content to accept the survey, and to palm off its lands upon innocent purchasers, upon the faith of the representations embalmed in the field notes and plat of the survey as returned. With what propriety can it now come forward after a score of years, during which values and industrial conditions have been entirely transformed, and seek to make the correction which from the standpoint of ordinary good faith and fair dealing, it should have made if ever, before putting these lands upon the market?

(e). It appears to have been a matter of the utmost notoriety, that nearly all the public land surveys in the early history of the country erred in the favor of the settler or purchaser. There appears, however, always to have prevailed in popular as well as in executive and judicial circles, a sentiment that as the settler or purchaser necessarily assumed the hazard of finding less land inclosed by his monuments than reported by the surveyor, he might reasonably claim the benefit in case of an excess. The reasonableness of this view was asserted by this court in the early case of *Taylor vs. Brown*, 5 Cranch, 234, 249-252. A patentee of land was there charged by the court as trustee for one claiming under a prior survey, despite the fact that such survey had inclosed three thousand acres upon a warrant for two thousand. It was held

that to curtail the survey, *"would be unequal and un just, inasmuch as a survey which is too small cannot be enlarged."* Similar views have frequently been expressed in state decisions.

Beckly vs. Bryan, Sneed's Ky. Cas. 107.
Johnson vs. Buffington, 2 Wash. (Va.), 116.

In *Houston vs. Pillow*, 1 Yerg., 481, 488, it was remarked by Catron, J., that he knew of no instance anywhere, in which a state had sought to recover patented lands on account of excessive acreage enclosed by the survey. Forty years later, as a member of this court, in the opinion in *White vs. Burnley*, 20 How., 235, 247, he reiterated the remark. So far as we know it remains true to this day, although the right of the state to some form of relief in cases of extreme discrepancy, has been generally conceded by the courts, *arguendo*. The circumstance attests the existence of a deeply seated sentiment that the state should stand by the results of the arbitrament of distance and quantity, accomplished through the survey of her sw rn officials. As a consequence, however, we are left without authority as to the kind or measure of relief which equity should afford the government in such instances. In principle, it seems clear, that under circumstances approximating these of the case at bar, the most that the government could expect to

receive at the hands of a court of equity, would be payment for the excess acreage at the rate per acre originally paid by the patentee. As the fault was that of the government's official ,and as the government would be thereby indemnified, any larger measure of relief would be oppressive.

Lindsay vs. Hawes, 2 Black, 554, 560, 561.

SEVENTH POINT.

Complainants are not chargeable with notice of fraud on the part of the surveyor, or of the discrepancy in the acreage; nor if they are, would their rights be affected.

There is nothing to indicate that either complainants, or their intermediate predecessors under the patentees, examined the premises before purchase, or had any knowledge of the excessive acreage enclosed by the monuments.

The supremacy of the monuments does not rest upon any assumption that they have been seen by the grantee.

Anderson vs. Richardson, 92 Cal., 623.

This principle was involved also in the case of *Land Co. vs. Saunders,* 103 U. S., 316, 322. It appeared in that case that the side line of Hart's location, which was held to constitute a monument, had never been seen by anybody, or in any manner definitely located, and could be located only by recourse to the courses and distances of the Hart grant.

The contention made by defendants in this regard would have invalidated the patents in all the cases hereinbefore cited, in which large excesses of acreage were involved, and in which nevertheless, the monuments were sustained.

Thus in *Newsom vs. Prior's Lessee,* 7 Wheat., 7, the patentee would have been chargeable with notice of an excess of eighteen hundred acres; and in *Mitchell vs. Smale,* 140 U. S., 46, would have been chargeable with notice that the lot contained seven-fold the acreage reported by the surveyor.

Every one, indeed, of the foregoing decisions in which the monuments have been sustained in cases of large discrepancy, must have been ruled otherwise, were this contention of the defendants sound.

The purchaser from the government, of these lots, if cognizant of the discrepancy, would still be justified in assuming that upon the general law of the subject, as well as by force of the terms of the statute, the government would be estopped to claim the excess, just as in the case of the deficiency of acreage, he would be

estopped from claiming relief. If such a purchaser had taken pains to investigate, he would have found from the public records, as already pointed out, that the government with full information of the absence of actual measurements by the surveyor, had elected to abide by his return, and it would not be incumbent upon him to undertake to determine whether the discrepancies about the shore of this lake were in fact the result of fraud on the part of the surveyor or the result of accident, forgetfulness or some form of carelessness. Nothing short of actual collusion or "evidence that the grantee participated in the matter" would suffice to impair his rights.

White vs. Burnley, 28 How., 235, 247.

EIGHTH POINT.

That the lots platted as abutting upon the lake, will overlap one another if recognized as extending to the actual shore, and that a few of them will not reach the lake without a slight deflection from due course, are facts which in no way concern either the government or the defendants; nor do they present any legal difficulty.

Had the discrepancy in the location of the lake shore, been brought about by gradual reliction or by

alluvion, the distribution of the relicted or newly formed belt of land, would have been easily made upon familiar principles. While there is not absolute uniformity in the methods adopted by the courts for so deflecting and readjusting the side lines of adjacent tracts as to effect an equitable apportionment of flats, shallows, and relicted lands, equality is the mark at which all courts aim, each adopting the particular basis of apportionment which it supposes will best subserve that end. In all the methods, equality is the acknowledge principle, with whatever variation of detail it may be worked out. If this were a case of reliction, or alluvion, and the government or the defendants, claiming the controverted belt, should assign as the reason for their claim, that the law is incapable of apportioning the land among the originally abutting owners, so that it was necessarily left as no man's land, the suggestion would be esteemed notable only for its risibility. It is not a wit less so here. If the platted abutters are entitled to this land, the mutual impingements of their respective tracts, are ideal instances of such conflicting interests as it is the normal function of the law to co-ordinate. The question presented is merely what kind of apportionment will, in such a situation, insure equality; and the law has never yet acknowledged its incapacity to determine in any of the relations of life, what shall be deemed to constitute equality.

It is said, however, that plaintiff's lot 3, though extended indefinitely southward, would not strike the lake unless its side lines were deflected slightly to the east; and that plaintiff's lots 5 and 6, would not reach the lake within the limits of section 4, unless their side lines were slightly deflected toward the south. But the lake is called for as the boundary of each of these lots, and the courses reported by the surveyor are no better able to compete with the monuments than the distances are, nor are courses and distances and quantities combined, of any more force as against the monuments than any one of them standing alone. As pointed out on the last few pages of this brief, the defendants misconstrue the decision in *French-Glenn Live Stock Company vs Springer*, 185 U. S., 47, if they suppose it to imply that courses are any more forceful than distances, in competition with monuments. It is doubtful whether the government has ever surveyed a section of land, whose marked boundaries conformed to the surveyor's return, with respect to either course or distance. Is it not an every day occurrence, to recognize the aberrant courses of the curved or crooked lines actually blazed by the government surveyor, as superior to the straight lines called for by the regulations and the field notes?

Could any owner of lot 8, for example, while claiming to reach the lake as his monument, despite the surveyor's erroneous specification of distance, be heard

to argue that an owner of lot 3, should be barred from reaching the lake as *his* monument, by force of the surveyor's erroneous specifications of courses. The latter are no better able than the former to stand between an owner and his monument.

The only difference in this connection between the position of lot 8 and that of lot 3, is that for *deflecting* the side lines of the former as they cross the controverted belt of land, there is but one reason, to-wit; that the actual shore of the lake may be distributed rateably among those who, as the lake was pictured by the surveyor, appeared to be abutters upon it; whereas in the case of lot 3, there exists concurrently with this reason, another, viz.: that lot 3 may find its southern terminus and boundary upon the shore of the lake as a monument, conformably to the representations of the plat.

The surveyor was derelict in estimating instead of measuring the distances and courses to Cedar Island Lake, and the patentees of all lots which *by reason of this dereliction* were accredited with a boundary upon the lake, are thereby thrown into a legal relationship with one another, which not only enables but constrains the court to so establish the side lines of their several tracts across the belt of excess acreage, that upon the contracted shore of the actual lake, each shall have the same *proportionate* frontage that it apparently had upon the larger shore pictured upon the plat.

It is important to distinguish a case like this, where

through common subjection of the parties to processes of alluvion, or reliction or to carelessness or fraud in a surveyor, relations are established which justify and make feasible a deflection of courses, from another class of cases in which either an extension of distances, or a deflection of courses, in order to reach a monument, might be made impossible by the vested rights of third parties in adjacent tracts.

For the purposes of the questions that here arise between the plaintiff patentees, and those claiming subsequently under the government or its land laws, it seems to be clearly immaterial whether the lands which by the plat appeared to abut upon the lake in Sections 2, 3, 4, 9, 10 and 11 were all entered at one time by one individual or at different times by different parties. *The plat is an entirety, and each individual purchased in the light of and subject to all the representations which appeared upon its face*, so that the purchaser of each abutting lot appearing to front upon the lake acquired a right to such frontage *no less as against the purchasers* of the other lots, than as against the government.

If indeed, the surveyor, instead of being guilty of a single dereliction deranging all his distances to the lake, had returned accurate measurements to portions of its shore, it would seem clear that those abutters whose lots were not implicated in the discrepancy would not have their frontage curtailed for the relief of those

whose lots were so implicated. The shrinkage of water front must be borne by those who stand related to the error which has necessitated the apportionment, and who are beneficiaries of the increased acreage. This apportionment of the controverted belt among the platted abutters, seems, however, to be so remote from any interest or concern of the defendants as to make its further dicussion inappropriate here.

NINTH POINT.

It is not a material circumstance that the government contractor and deputy surveyor to whom the government confided the sub-division of this township may have fraudently neglected to perform his duty.

It is conceded that the report of survey and field notes which were returned to the surveyor general were upon their face perfect, with nothing about them to suggest that they were fictitious. There is no attempt to prove knowledge on the part of the plaintiff or its grantors that the survey had not been regularly made. No attempt is made to impeach the good faith of any one claiming these lands under the government.

The lands were entered or purchased from the government upon its representation in substance that they had been duly surveyed, and that the plat which was on file in the Local Land Office was a correct representation of such survey. What means had the purchaser under the government of knowing the contrary?

Any other rule would involve titles in an intolerable uncertainty. Any failure of a surveyor to make actual measurements is in the nature of a fraud upon the parties interested. A failure to measure a single section line, is as truly a fraud as the failure to measure any of the section lines within a township. From the nature of the case, the principal evidence of the failure to measure, must ordinarily consist in the magnitude of the discrepancy between the actual and the reported distances between monuments. The supremacy of the monuments, if it could be undermined by the fraud or gross negligence of the surveyor, would depend in every case upon the unconstrained judgment of a jury, as to whether under all the circumstances of the particular case, the discrepancy between the actual and reported distances should be regarded as of sufficient magnitude to justify the inference that the surveyor estimated instead of measuring his distances.

The defendants while claiming that patents issued for lands which have not been actually surveyed are illegal and void, when they come to apply the proposi-

tion to the case in hand, seek both modestly and judiciously to restrict it to those portions of the actually unsurveyed lands in this township which encircle the immediate shores of the lake, and which are now occupied by themselves. They boldly claim that not an acre of land in the entire township was ever surveyed, yet they generously concede that the patents are all probably unassailable, except so far as they effect the particular strip which they desire to appropriate.

It would, of course, be an intolerable doctrine, that after the government has filed field notes and compiled therefrom a plat of an ostensible survey of a township, and upon the strength of such ostensible survey and plat has sold the lands purported to be covered by it, it should still be at liberty to upset the titles which it has thus created, by claiming and proving that no survey had in fact been made. Any such doctrine would not only overthrow all the titles in this township, but would jeopardize titles generally throughout the newer portions of the country. The attempt of defendants to discriminate in this regard against the belt of land immediately encircling the lake, is obviously fallacious. The only cases which they cite in support of the contention that patents are void if issued for lands not actually surveyed, are such as *Horne vs. Smith*, 159 U. S., 40 and *Niles vs. Cedar Point Club*, 85 Fed., 45, in both of which cases it was held that when interpreted, as they must be, in the

light of the physical characteristics of the land to which they relate, the field notes and plat themselves imported a termination of the survey at a particular natural monument;—in the former case at a bayou, and in the latter upon the line of a marsh. Neither case goes to the length of holding that the government after disposing of lands upon the strength of an ostensible survey and plat can resume them again upon the claim that the survey was fictitious. Each case rests squarely upon the proposition, that when read alongside of the physical features of the land platted, the field notes and plat imported a termination of the survey at a certain well defined natural boundary or monument. All that we ask in this case, is what the court awarded in each of those cases, to-wit, that the survey of our Section 4 may be held to extend to the natural monument upon which it *purports* to terminate, to-wit, Cedar Island Lake.

The point has moreover been so repeatedly adjudged that it cannot be regarded as debatable. In *M'Iver's Lessee vs. Walker*, 9 Cranch, 173, it is noted by the court, that no survey was ever made. (p. 173). For a chain of eleven surveys of five thousand acres each, only one starting point was marked, and no further measurements made. Yet a creek, although not referred to in the patent, or the certificate of survey, and although not occupying the position of a boundary, was, because delineated upon the plat, held

to be a natural monument to which courses and distances must be subordinated.

It was again so held in *Newsom vs Pryor's Lessee,* 7 Wheat., 7, where as already noted, the discrepancy in distance was more than a mile. In discussion of this subject Chief Justice Marshall said:

> "It is apparent that a survey was not made in fact, but that, after marking a beginning corner, the surveyor made out and returned a plat, which he supposed would comprehend the land intended to be acquired. It is now too late to question the validity of grants made on such plats and cirtificates of survey. From the extraordinary circumstances of the country, they were frequent, and, in consequence of those circumstances, have received the sanction of courts. An immense number of titles, believed to be perfectly secure, depend upon the maintenance of such grants. The extent of mischief which would result from unsettling the principle, cannot be perceived; and is certainly too great now to be encountered. The patent, therefore, must be considered as if the survey had been actually made."

In *White vs. Burnley,* 20 How., 235, it is remarked that "probably no actual survey was made on the ground;" yet the patent was held to have passed the two leagues of land wrongfully enclosed by the surveyor, although only one league was called for by the grant. The case seems to be directly in point, that

all the land actually covered by a survey *as returned,* —or rather all the land *purporting* to have been so covered, will pass by the patent whether there has been an actual survey or not.

In *Chinoweth vs. Haskell's Lessee,* 3 Pet., 92, 94, 96, 98, also, it was conceded that the monument must prevail, although no actual survey had been made.

To the same effect is *Blake vs. Doherty,* 5 Wheat., 359, where by Chief Justice Marshall, it was said: "The grant purports to have been made upon an actual survey; and the non-existence of that survey though it may increase the difficulty of ascertaining the land granted, does not change the face of the instrument." And it was held that search must be made for the monuments as though the survey had been made.

Upon this subject, it seems difficult to add anything to what is so effectively said by Lochren, J., in *Murphy vs. Kirwan,* 103 Fed., 104, 107, where he expressed himself as follows:

> "In the surveying, platting, offering for sale, of lands, the government deals as proprietor. The transactions are matters of business; and as between the government and its patentees, or the purchasers from such patentees, all the rules applicable to private ownership and private sales attach, as in the case of an individual vendor. The government, through its agents and employes, makes the surveys and prepares the plats according

to which it offers for sale and sells its lands. If its agents and employes are negligent or unfaithful, and loss to the government results, it cannot shift that loss upon an innocent purchaser, who has bought and received title upon the representations of the plats prepared by the government, and according to which the land is offered for sale, and the sales made, and the title to the lands conveyed by patent. * * * * The government, as against purchasers in good faith, like the complainants, is bound by its own plat, in accordance with which it has sold and conveyed all the land in that township."

The reversal of that case in this court was upon other grounds.

Kirwan vs. Murphy, 189 U. S., 35.

There are many state decisions laying down the same rule. In fact nearly all of the cases heretofore cited, involving large discrepancies between distances and quantities on the one hand and monuments on the other, are explicable only upon the theory that the surveyor substituted estimates for measurements.

The absence of survey expressly appeared in *Simm's Lessee vs. Baker,* Cooke (Tenn.), 146, and in *Singleton vs. Whiteside,* 5 Yerg. at p. 36, and in *Whiteside vs. Singleton,* Meigs (Tenn.), 207, 218, 219.

Also, either expressly, or by necessary inference, in the following cases:

Fowler vs. Nixon, 7 Heisk, 719, 724.
Sturgeon vs. Floyd, 3 Rich., 80.
Stafford vs. Qing, 30 Texas, 257.
Phillipps vs. Ayers, 45 Texas, 605.
Jones vs. Burget, 46 Texas, 292.

TENTH POINT.

Meander lines in their relation to the rule of monumental supremacy.

In the case at bar, the implement with which defendants propose to cut off plaintiff's lots half a mile from the lake upon which they appear to abut, is the meander line returned by the surveyor as correctly delineating the lake shore. The proposition is to invoke and utilize the meander line as a boundary, to stand in antagonism to the lake shore, and as a substitute for it.

They propose a departure from the doctrine, long ago arrived at as a simple application of the supremacy of monuments over courses and distances, that a meander line is never a boundary line, since the real boundary is always the water. The words "along

the water," are implied in every specification of course and distance in a meander line, as unmistakably as the words "along the marked line," are implied in every specification of course and distance in connection with a township or section line. The water line which the surveyor *adopts*, is as binding as the timber line that he blazes. Moreover, however widely the courses of the meander line may seem to carry it from the shore line, in its transit across a particular section, it is definitely anchored to the shore at each side of the section. Thus by reference to page 36 of Record, it will be seen that the meander line across section four begins and ends at "corners," which by reference to pages 32 and 35 are reported to consist of two posts set respectively on the "north shore" and "west shore" of the lake, at the points of its intersection with the east and south lines of the section. This was required by the regulations. (Public Domain, 590).

From this point of view particularly, we are at a loss to understand, upon what theory it is, that our lots are claimed to be cut off by a meander line intersecting the east and south lines of the section over half a mile or more from the lake, when that same line is, in terms, described by the surveyor as striking into section four at a point *on the lake shore* which he has marked by a post, and as leaving it, at another point on the lake shore, similarly marked.

It should be borne in mind that there is nothing in the statute calling for a survey of the meanders of a shore; that the intention of the statute was to adopt the shore line as a natural boundary; and that confessedly the surveyor's approximations to its courses and distances, have no other end in view than to inform the land officers of the acreage to be charged for. This fugitive character of the so-called meander line, is further attested by the fact that no provision is made for corners, or for any kind of artificial marks, or monuments in connection with it. Its only monuments other than the shore itself, are the fractional section corner posts which mark the termination upon the shore of the intersecting section lines. But if it were intended as a boundary line, a post or other monument would be provided for the marking of each point at which there is a change of course; such being one of the elementary rules of the surveyor's art. It was the absence of such monuments to mark the several changes of course that was held to characterize such a line as fugitive, in the interesting and well considered case of *Bruce vs. Taylor*, 2 J. J. Marshall, 160, 161.

In order to locate the meander line more than half a mile from the lake, the proposition of defendants is, not only to ignore the implied description in the plat and field notes of every link in the meander line as running "along the lake shore," but to reject from the description of it in the field notes, the above men-

tioned express call for the lake shore as a monument, at the point where it enters section 4, and at the point where it leaves it. If those two monumental calls which as above shown, are expressly made in the field notes, are to be respected, the intervening courses and distances of the meander line, across section 4 as reported in the field notes, become so grossly incongruous and indeed so impossible as to fall of their own weight. So that whether the general subject be viewed in connection with the south and east lines of section 4, as they purport to carry complainants' lots to the lake as a monument, or in connection with the meander line which is expressly conditioned to enter and leave section 4 at its points of intersection with the lake shore, and is impliedly conditioned to follow the lake shore across the section, the result is the same.

From a review of the authorities, it will appear that this court and the courts generally, have administered the rule in favor of monuments, with as firm a hand, against the courses and distances of meander lines, as against those of any other lines; which means only, that it has accorded to waterways the monumental force universally accorded to other visible marks or objects made or adopted as boundaries.

St. Paul R. R. Co. vs. Schurmeier, 7 Wal., 272, 286, 287, involved the ownership of a tract of land, part of the time an island, lying between the meander line and

the actual low water mark of the Mississippi River. The court said:

> "Meander lines are run in surveying fractional portions of the public lands bordering upon navigable rivers, *not as boundaries of the tract, but for the purpose of defining the sinuosities of the banks of the stream, and as the means of ascertaining the quantity of the land in the fraction subject to sale, and which is to be paid for by the purchaser.*
>
> "In preparing the official plat from the field notes, the meander line is *represented* as the border line of the stream, and shows, to a demonstration, that the water course ,and not the meander line, as actually run on the land, is the boundary."

Hardin vs. Jordan, 140 U. S., 371, was an action of ejectment in respect to premises lying partly between the meander line and the shore, of a small lake, and partly in the bed of the lake. It was held that the plaintiff's lots, rendered fractional by the meandered lake, extended beyond the meander line, and to the center of the lake. The court said:

> "The meander lines run along or near the margin of such waters are run *for the purpose of ascertaining the exact quantity of upland to be charged for, and not for the purpose of limiting the title of the grantee to such meander lines.* It has frequently been held both by the Federal and State courts that such meander lines *are intended for the purpose of bounding and abutting*

the lands granted, upon the waters whose margins are thus meandered; and that the waters themselves constitute the real boundary."

The court quotes with approval from *Middleton vs. Pritchard,* 3 Scam., 510:

"Where the government has not reserved any right or interest that might pass by the grant, nor done by any act showing an intention of reservation, such as platting or surveying, *we must construe its grant most favorably for the grantee, and that it intended all that might pass by it.*"

The court said further:

"*The plat of the lake* and the land surrounding it, referred to in the patent granted to Holbrook (plaintiff's ancestor) *exhibits the fractional section surrounding the lake as immediately bordering upon it;* and *this,* as shown by the authorities cited, *constitutes the lake itself the real boundary of the land, without regard to the meander line.*"

A similar case was that of *Mitchell vs Smale,* 140 U. S., 406, reaffirming the decision of *Hardin vs. Jordin, supra,* and applying the law, as there declared, to the case of a ridge or strip of land extending out into the lake from the plaintiff's fractional quarter section or lot, indicated on the plat as bordering the lake. This fractional subdivision was shown on the

plat and was patented as containing four and a half acres. The ridge in question projected into the lake and beyond the meander line, 220 rods, or about two-thirds of a mile, and was 28 rods wide at its base end and of varying widths elsewhere; and embraced an area of some twenty-five acres; or about six times the area of the lot, as shown in the survey as returned and platted. It was held that the patent of the fractional subdivision conveyed the ridge in question and that a subsequent patent of the ridge (under which defendant claimed title) was of no effect. The court, speaking of the government surveys and plats, said:

> "Our general views with regard to the effect of patents granted for lands around the margin of a lake *and shown by the plat referred to therein, to bind on the lake*, were expressed in the preceding case of *Hardin vs. Jordan*, and need not be repeated here. We think it a great hardship, and one not to be endured, for the government officers to make new surveys and maps of the bodies of such lakes after selling and granting the *lands bordering thereon, or represented so to be.* It is nothing more nor less than taking from the first grantee a most valuable, and often the most valuable part of his grant. Plenty of speculators will always be found as such property increases in value to enter it and deprive the proper owner of its enjoyment. The patents issued refer to this plat for identification of the lots conveyed, and are equivalent to, and have the legal effect of a declaration that they extend to and are bounded

by the lake or stream. Such lake or stream itself, as a natural object or monument, is virtually and truly one of the calls of the description or boundary of the premises conveyed."

At page 414, the court speaking by Bradley, J., continued:

> "The existence of such projecting tongue is entirely consistent with the water or lake, being the natural boundary of the plaintiff's land, which would include the said projection if necessary in order to reach the said boundary. *It has been decided again and again that the meander line is not a boundary, but that the body of water whose margin is meandered is the true boundary.*"

We confidently submit that in thus expressing itself the court spoke adviseldy. The principle that has been adjudicated over and over again, is that a so-called meander line is not run for any purpose of boundary, and does not in any manner enter into the description of patented tracts. It is run and recorded for purposes *alien* to those of boundary and description. The case is not one of conflict between superior and inferior descriptions or elements of description; for the meander line is according to these reiterated determinations entirely destitute of boundary line and descriptive qualities. If the court of last resort had not explained why a meander line

cannot successfully compete with the water line which it represents the door might have been open for such an argument as is made by counsel for respondents, that the water line is the true boundary, only under ordinary circumstances or as a general rule, but against every contention of this kind the door is shut by the settled doctrine that the meander line is run for other purposes than boundary and description, and that it does not partake of the nature of either.

It is doubtful whether the heart of this general subject has ever been more deeply penetrated than it was by Chief Justice Wilson of the Minnesota Court, when in *Schurmeier vs. St. Paul R. R. Co.,* 10 Minn., (Gil.) 59, a case, the facts of which are too familiar to require recitation, he declared, "There is no such thing as a meander line in such case, distinct and and separate from the line of the river." For every legal purpose this is literally true. A meander line is only an *attempt* to trace roughly and approximately, upon the ground, in the field notes and upon the plat, an actual water line. Whenever and so far as a so-called meaner line, as it is traced upon the ground, recorded in the field notes, or delineated upon the plat, departs from the actual water line, it fades out as rapidly as it is delineated, for every conceivable legal purpose, except the fixation of the purchase price. It is a mere *attempt* to roughly locate and describe a natural boundary, and even this *attempt* is made as

already noticed, not for any purpose of boundary or limitation, but merely as a step in the calculation of purchase price. The so-called line is neither more nor less forceful than it would be if under the regulations of the department, no other minute or trace of it were required to be preserved in the field notes than a mere memorandum of the acreage, thus ascertained, of each riparian lot. Interesting illustrations of the accuracy of Judge Wilson's position are found in such cases as *Sizor vs. Logansport*, 151 Ind., 626, 628, and *Boorman vs. Sunnucks*, 42 Wis., 233, holding that even where the meander line is referred to *eo nomine* as a boundary line, the reference is to the actual water line.

Everson vs. City of Waseca, 44 Minn., 247, involved the question whether a patent of a government lot appearing on the plat to be bounded by a lake, conveyed title to the shore of the lake, notwithstanding the fact that several acres of dry land lay between the meander line and the actual lake shore. It was held that the lake, and not the meander line, constituted the boundary of the patented lot. The case was decided squarely upon the principles that the so-called meander line is not in any sense a boundary line, and that the estimated acreage of a patented lot cannot, upon the question of its limits, be brought into competition with the natural boundaries of the patented tract.

The court said:

"The purchaser from the United States purchased lot 2, the established northern boundary of which was the lake. Whenever the surveyed meander line failed to conform to the shore of the lake, the latter—the fixed, physical boundary or monument—is to prevail, and the surveyed line must be disregarded. The general familiar rule of law is applicable in such cases. *While, therefore, the price of the land sold by the government was computed upon the assumption that the meander line and boundary line (the shore of the lake) were identical, that does not affect the extent of the grant made* by the patent conveying lot 2. The lake, and not the meander line, was the fixed boundary of the land conveyed. No conditions exist which can create an estoppel against the purchaser, and make the real physical boundary, existing in fact and shown by the government survey and plat as the boundary, to yield to the surveyed line."

Lamprey vs. State, 52 Minn., 181, did not directly involve the question in hand, but the words in which Mitchell, J., in delivering the opinion of the court expressed himself *arguendo* are well worthy of quotation. They are as follows:

"There are certain matters which are so well settled that they may be summarily disposed of at the outset. Without troubling ourselves to consider what were the rights of the United States

in these waters before they conveyed the lands bordering on them, it is well settled that having disposed of lands bordering on the meandered lake by patent, without reservation or restriction, they have nothing left to convey, * * * *and also that the meander line is not a boundary,* but that the water whose body is meandered is the true boundary, whether the meander line in fact coincides with the shore or not."

In *Forsyth vs. Smale,* Fed. Cas. No. 4950, the question was before Judge Drummond in a case involving the title to a point of land of substantial proportions extending beyond the meander line into a lake. Applying the principle of the Schurmeier case, that meander lines are not run or to be used as boundary lines, he held the patented tract not to have been limited by the meander line.

It was again so held, in the late well considered case of *Schlosser vs. Crookshank,* 96 Iowa, 424, (65 N. W. R., 344), which in its essential features was not distinguishable from this case. Several cases were considered together. The facts in one of the cases only need to be stated. The plaintiff, Schlossor, claimed title to lots 2 and 3 of a certain section under a patent, in the usual form, conveying the lots with reference to the plat of the survey. The plat showed the lots as bounded by a meandered lake two miles wide and three miles long, (the banks of which

were clearly defined); and showed the area of the specified lots as being 99 acres; but the meander line, which touched the shores of the lake in only one or two places throughout its whole extent around the lake, and was never coincident with the shore line, was so far from the lake that it left 100 acres of land between the meander line of the plaintiff's lots and the shore of the lake; an amount exceeding the area of the lots as embraced within the meander line. Schlosser's meander line did not touch the shore of the lake at all. A part of the land was high, dry, tillable land, some of it meadow or pasture land and some low and unfit for cultivation. Nearly all of the land was never overflowed. The defendants had entered upon this land for the purpose of securing it for a government homestead. It thus appears that the case was almost exactly like that at bar. This was an action by one who had succeeded to the title of the patentee to establish his ownership, and to enjoin the defendants from entering and using it. The sole question was whether the patent conveyed the land between the meander line and the lake. It was held that it did. The court said: (pp. 420-421).

> "In these cases there was a body of water to meander. There was a meander line run which appears on the plat of the government survey as coincident with the line of the lake. The plat does not show any reservation, or attempted reser-

vation of the land in controversy in these cases, or any of it. It would appear then that the government *intended* when it patented the lands to convey to the purchaser the land to the lake, not merely to the meander line * * * * It can not be said that evidence which merely shows that the meander line was not, when the government survey was made, coincident with the line of the lake, and that there was then a body of land lying between such line and the high water mark of the lake, will overcome the presumption (that the government intended to convey to the lake). To overcome such presumption would require some evidence to show that the grantor, the general government, had done, or attempted to do, some act inconsistent with the presumption; such as having *previously* surveyed the land in dispute as government land, or conveyed it to others than the plaintiff's remote grantors, or in some manner making a claim to the disputed ground. * * * The general rule *applicable also to the Federal Government,* is that all grants are to be construed most strictly against the grantors, and reservations will not be implied. *Butler vs. R. R. Co.,* 85 Mich., 246; *Chandos vs. Meek,* 77 Wis., 573; 146 N. W. R., 803.

"The statement of the number of acres in these patents in no way limits the extent of the grant. *To so hold would in effect be holding that the meander line was a boundary line, which, as we have seen, is not the case.* The riparian holder of the patent takes all the land to the shore of the lake, though he may thereby obtain a larger acreage than his patent calls for."

So in *Menasha, etc., Co. vs. Lawson,* 70 Wis., 600, where there was a discrepancy of some three hundred and twenty feet between the meander line and the shore, the court said:

> "The foregoing cases we think clearly establish the rule that on all sales of land by the United States of lots which are bounded by a river, the purchaser takes to the shore or bank of the river, and the meander line *not being a boundary or in any way referred to as such in the conveyance* cannot have any effect in giving direction to the lines of the lot as designated on the government plat."

So in *Coburn vs. San Mateo County,* 75 Fed., 520, 530, where the same principle was applied to a survey of the seaward boundary of a Mexican grant.

The question presented by the case at bar, is identical with that involved in the case of *Murphy vs. Kirwin,* which involved the title to other portions of this same belt of land lying between Cedar Island Lake and its meander line.

Kirwan vs. Murphy, 83 Fed., 275, (C. C. A.)
Murphy vs. Kirwan, 103 Fed., 104.
Kirwan vs. Murphy, 109 Fed., 354, (C. C. A.)

The plaintiffs in the Murphy case are the owners of all the lands which by Exhibit "B" of this record

are shown to abut upon Cedar Island Lake, except the four lots owned by the plaintiff in the case at bar, and except the tract lying at the southeast corner of the lake and shown as lots 4, 5 and 6 of Section 2, and lots 1 and 2 of Section 11. (See 83 Fed., 276). In principle the two cases are identical. There were some affirmative proofs in the Murphy case that the lands had been entered by the patentees in actual reliance upon the water frontage disclosed by the plat. Such proofs were of course unnecessary, as it is conceded by all courts dealing with situations of this kind that presumptively a water boundary is of substantial value and is relied upon where noted upon the plat with reference to which the entry or purchase is made. Thus in *Newsom vs. Pryor's Lessee,* 7 Wheat., at page 10, it is said by Chief Justice Marshall:

> "Generally speaking it is the particular intention of the purchaser to acquire the land lying on the stream called for as being more valuable than other land."

And this presumptive value of and reliance upon the water frontage he assigns as a substantive reason for according superiority to such a natural monument over courses and distances, and over artificial monuments.

So in *Lamprey vs. State,* 52 Minn., at p. 197, it is said by Mitchell, J.:

"Owners of lands bordering on inland lakes have often bought with reference to access to the water, which usually constitutes an important element in the value and desirability of the land. If the rule contended for by the appellants is to prevail, it would simply open the door for prowling speculators to step in and acquire title from the state to any relictions produced in the course of time by the recession of the water, and thus deprive the owner of the original shore estate of all riparian rights, including that of access to the water."

This language was used with reference to a case of reliction, but it is quite as much in point for the purposes now in hand, and indeed, serves to remind us that the law of reliction and accretion rests largely upon this *presumption* that the water frontage is an element of value which enters into the purchase and purchase price of every tract which is represented to the purchaser as being riparian.

In principle, the question presented by the case at bar, is closely analogous to that which was involved in *Nicolin vs. Schneiderhan*, 37 Minn., 63. That was a case in which a city lot was delineated upon the recorded plat as extending from a street on one end to a creek on the other, just as our government lots were delineated upon the government plat as extending from the blazed town line to the lake. In the Nicolin case the side lines of the lot in question were described as

thirty-five feet and thirty-three feet respectively in length. In fact the distance between the street and the creek was 59¼ feet along the former side line and 51½ feet along the latter, the average distance being thus more than fifty per cent. greater than indicated upon the plat. After making allowance for the difference between the relative accuracy of town plat surveys and remote forests surveys, commented upon by Clifford, J., in his above quoted opinion, the discrepancy in the Nicolin case is about as inexplicable as is that in the case at bar. It cannot be explained by any hypothesis of mere inaccuracy of measurement. Equally with the facts in our case, it is suggestive of a failure on the part of the surveyor to make any measurement at all and of his reliance upon mere recollection or conjecture. It was contended there as here, that the discrepancy was so great that the specification of distance should prevail over the monuments. In answer to this contention, the court, speaking by Mitchell, said:

> "Plaintiff, claiming that lot 1 extends south from Water Street only the distance indicated by these figures (35 and 33 feet) as the length of the east and west lines, brings ejectment against defendant for the strip of land lying between that and Sand Creek. We remark, in passing, that we do not see why he might not with equal propriety have measured from Sand Creek north, and claimed the strip of land fronting on Water Street.

The defendant claims that, according to the plat lot 1 includes all the land between the street and the creek.

"Upon these facts there are two very familiar and well-established principles in the construction of conveyances, which are, in our opinion, decisive of the case: First, where a map or plat is referred to in a conveyance, it becomes, for the purpose of the description and identification of the land, a part of the deed; and, second, courses and distances must yield to monuments, visible objects, or natural boundaries called for in the deed. The plat according to which plaintiff conveyed, and to which his deeds referred, makes Sand Creek the south boundary as distinctly as it makes Water street the north boundary of lot 1. It represents the east and west lines of the lot as extending from the street to the creek. Conveyances made with reference to this plat must be construed as calling for these boundaries, the same as if expressly incorporated into the body of the deeds, and, under the familiar rule referred to, these must control the distances."

Upon the same principle, in *Olson vs. Thorndike*, 76 Minn., 399, ejectment was maintained for a strip of land between the Minnesota River and its meander line, the disputed tract being about 51 rods in length and 26 rods wide at the broadest end.

"In ascertaining the boundaries of surveys or patents, the universal rule is this: That wherever natural or permanent objects are embraced in the

calls of either, these have absolute control and both course and distance must yield to their influence."

Brown vs. Huger, 21 How., 305, 318.
Preston's Heirs vs. Bowmar, 6 Wheat., 581 (per Story, J.) at p. 582.
Tyler on Boundaries, 30.

So in *Menasha Wooden Ware Co. vs. Lawson,* 36 N. W., 412, (Wis.), the actual shore line of the stream was held the true boundary of a government lot as against a meandered line three hundred and twenty feet distant.

The court said:

"We think the cases in this court, in Minnesota, in the Supreme Court of the United States, and in other courts, expressly hold that the meander lines made by the government surveyors are not to be considered in determining the actual boundaries of lots which are sold by the government as bounded upon rivers or other navigable waters. The government plats show on their face no meander lines as different from the actual banks or shore of the rivers upon which such lots are described as lying. The purchaser does not know the meander lines and does not purchase with any regard to them. He purchases a lot bounded on either two or three sides by straight lines, and on the other side by the river as shown upon the plat. We think this was expressly decided in the case of *Schurmeier vs. R. R. Co.*, 10

Minn., 82; 7 Wall, 272; both by the Supreme Court of Minnesota and the Supreme Court of the United States."

So in *Wright vs. Day,* 33 Wis., 263. The court said:

> "The meander line of land bordering upon a navigable stream or river is never considered the boundary line of the government sub-division on the side next the river, but the purchaser from the government takes to the margin of the stream or water's edge."

And again in *Boorman vs. Sunnuchs,* 42 Wis., 243, it is said that:

> "If the meander line and the actual water line differ, the latter is the true line of a lot bounded in terms by the meander line."

So in *Sphung vs. Moore,* 22 N. E., 319, (Ind.), the actual water line was held to prevail over the meandered line, which was pronounced no boundary line in a case which involved a discrepancy of forty-three acres in the size of a single government lot.

The same rule was applied in *Palmer vs. Dodd,* 31 N. W., 209, (Mich.), in which in the case of a similar discrepancy it was held that:

> "The meander lines run by government surveyors have no significance as boundaries and are

only intended to afford a means of computing the number of acres the government requires payment for, nor is the grantee limited to the number of acres specified in the patent."

For additional applications of the same rule, see also the following cases:

County of St. Clair vs. Livingston, 23 Wall., 46, 62-3.
Fuller vs. Dauphin, 124 Ill., 542.
Clute vs. Michigan, 65 Mich., 48.
Chan vs. Brandt, 45 Minn., 93.
St. Paul &c. R. R. Co. vs. St. Paul &c. R. R. Co., 26 Minn., 31.
Ladd vs. Osborn, 79 Ia., 93.
Heald vs. Yumisko, 7 N. D., 427.
Jones vs. Pettibone, 2 Wis., 308-320.

In this last cited case fifty-four acres lying between the meander line and the water were held to have passed with forty-six acres on the landward side of the meander line.

Although it was in the Schurmeier case that this court was first called upon to adjudicate the nature of a meander line as known to the standard surveys of our public lands, substantially the point involved had been repeatedly passed upon in this court and in many of the states. In *Lodge's Lessee vs. Lee,* 6 Cranch, 237, an island called Eden, had been conveyed *by name* accompanied by specifications of the courses and

distances of its shores. The courses and distances it was held, must yield to the actual shore line as a natural boundary or monument. The same principle had been recognized in *Brown vs. Huger,* 21 How., 305, 321, where also the court cites approvingly the case of *French vs. Bankhead,* 11 Grattan, 136, 157, applying a similar principle to a survey of Old Point Comfort. Decisions to the same effect abound in the state courts. An exceptionally instructive one, is that of Judge Robertson, in *Bruce vs. Taylor,* 2 J. J. Marshall, 160, (A. D. 1829). There was involved in that case a discrepancy of some 400 acres. The river was held to be the true boundary and the courses and distances were rejected. The case is quoted at length, and approved as very instructive, by Swayne, J., in *County of St. Clair vs. Lovingston,* 23 Wa., 46, 63. Of similar import are *Lynch vs. Allen,* 4 Dev. Bat., 62, and *Kelley vs. Graham,* 9 Watts, 116.

ELEVENTH POINT.

Review of defendants' meander line citations.

The only points of law determined in *Horne vs. Smith,* 159 U. S., 40, were that a misnomer of a body

of water by the government surveyor is not binding upon the government; so that if by mistake he fixes upon one body of water a name which belongs to another, the identity of the body of water is not thereby changed; that if in fact his surveys extend only to a given body of water they terminate there although he confuses the name of this body of water with another lying beyond; and that in determining whether he has misnamed the body of water upon which he terminated his survey, the plat and survey must be read in the light of the physical aspects of the territory surveyed, from which, rather than from his nomenclature, the courts must determine upon which of the two competing bodies of water his survey actually terminated. The case may be condensed into the single proposition that in determining upon which of several neighboring bodies of water a survey actually terminated, the nomenclature of the surveyor is less cogent than the physical aspects of the ground. The case was therefore soundly distinguished by Lochren, J., in 103 Fed., at page 108.

It is not contended in this case that there was any other body of water with which Cedar Island Lake was, or could have been, confused.

In *Bates vs. Ill. Cent. R. R. Co.,* 1 Black, 204, 208, there had been patented to one Kinzie a fractional section of land which, according to the government

plat and field notes, was bounded on the east by Lake Michigan, and on the south by the Chicago River, as at its mouth, it flowed due east into Lake Michigan. It turned out, that shortly before emptying into the lake the river divided itself into two branches, one flowing due east as delineated upon the plat, the other diverging towards the south a short distance before reaching the lake. The plat, when read in connection with the configuration of the ground, left no doubt that the mouth of the river which the surveyor had adopted as the south boundary of the Kinzie tract was the northerly mouth which flowed due east into the lake. The heirs of Kinzie nevertheless claimed the right to cross this mouth of the river and to take all of the land lying north of the more southerly branch of the stream, on the ground that the more southerly branch was the stream's true mouth.

The case therefore resembled *Horne vs. Smith* in that the ambiguity and dispute arose from the presence upon the ground, of two neighboring bodies of water, where only one was shown upon the plat. It differed from *Horne vs. Smith* in that the reason assigned for going to the further stream was, that the surveyor ought to have carried his survey to the further stream, although in fact he did not. Kinzie's heirs could not deny that the plat itself indicated that the northerly branch had been adopted by the surveyor as the south

boundary of the Kinzie tract, but their claim was, that he was bound to adopt the more southerly branch, because that was the main and true mouth of the stream. The case instead of bearing any resemblance to ours, is practically its opposite. We are contending that the monument by which, according to the plat, our land is bounded, shall be recognized; he was contending that the monument by which his land was bounded should be ignored.

Niles vs. Cedar Point Club, 175 U. S., 300, is of stil'l less interest. In that case (the opinion in which should be read in connection with the diagram found in 85 Fed. at page 47), there appears to have been a swamp or marsh some mile and a half wide by two or more miles in length, which was somewhat in the form of a triangle, abutting on the south upon the main land, on the west upon Maumee Bay, and on the east upon Lake Erie. From both the bay and the lake it was separated by sand ridges or points. This triangular tract of marsh the surveyor did not include in his survey, but meandered its three margins, to-wit, along the main land, along the bay shore, and along the lake shore; and upon one plat it was noted as "flag marsh," and on another as "impassable marsh or water." The court found that in fact it had always been land; that the plats did not import that it was anything else than land; and that it ought to have

been surveyed as such. The lots on the main land which abutted upon this marsh did not either by the field notes or by the plat purport to abut upon either lake or bay. On the contrary, the meander line of lake and bay appeared on the plat as more than a mile distant from them. The surveyed line which divided the marsh from the main land did not purport to be a meander line in any other than a literal sense, to-wit, a crooked line; and the only conceivable ground which the upland lot owners had for claiming the swamp was that the surveyor *ought* to have extended the survey over the swamp land but did not. The case did not present a single point of contact or analogy with the case at bar. It is no authority that a meander line is a boundary line within the meaning of the rule which we have been discussing, for the reason that the line between the uplands and the swamp was not a meander line within the meaning of the term as we have been using it. By a meander line, we of course mean, not merely a crooked or irregular line, but a line which is intended to follow the sinuosities of a stream or other body of water. The case was thus, and no doubt soundly, distinguished by Lochren, J., in 103 Fed., at page 108.

As to the case of *French-Glenn Co. vs. Springer*, 185 U. S., 47, we are unable to determine what it is that the learned counsel for defendants suppose it to

have decided. It seems incredible that they should construe it as adjudging that the courses will not be as readily modified as the distances, in the pursuit of a monument, or that a course will not be as freely deflected in order to reach a lake as a natural monument, as it will be in order to reach a marked tree or other artificial monument.

The French-Glenn case is easily put into a nutshell where it will remain, despite the admonition of an eminent English judge, that it is one thing to put a case into a nutshell, and another thing to keep it there. The case is simply a cross between the above mentioned cases of *Horne vs. Smith,* and *Niles vs. Cedar Point Club.* That there was a more or less watery area bounding the plaintiff's land on the north, seems to have been agreed by all the witnesses, the principal issue, as presented to the jury by the trial court, being as to whether, at the time of the survey that area was lake or swamp. The trial court charged, that if the jury "believed from the evidence that there was a swamp or marsh, instead of said lake, immediately north of, and adjoining, said lots," they should find for the defendants. See 35 Or, 312.

There is nothing to indicate the inaccurate measurement by the government surveyor of courses or distances, or to suggest that the discrepancy was due to any other cause than his treatment of the disputed area as lake, owing presumably to the especial wetness of

the season, when he should have treated it as swamp or marsh as the jury found. The case therefore resembled the Niles case in that the so-called meander line had been run not along a waterway, but along the margin of a marsh. It differed from the Niles case in treating and denominating the marsh as a lake; for in the Niles case there was no confusion whatever between lake and marsh, the two being sharply descriminated both in the field notes and upon the plat. But just as in *Horne vs. Smith*, the surveyor in terminating his lines upon a bayou, treated and denominated it as the neighboring river, so in the French-Glenn case, he erroneously treated and denominated a marsh, as the lake. The watery tract upon which he terminated the lines of the plaintiff's survey toward the north, was exactly where he supposed it to be; his mistake had reference not to its identity or location, but simply to its classification. It was a matter of nomenclature as in *Horne vs. Smith*. The refusal of the court in the French-Glenn case to deflect the courses in order to reach the lake, finds its exact analogue in the court's refusal, in the Horne case, to extend the distance in order to reach the river. In each case the court simply, and very properly, held it inadmissible to abandon the real thing upon which the surveyor had actually terminated his lines, and, misled by the mere sound of his words, to go off in pursuit of an entirely different monument from that which the surveyor actually had

in view. This is unquestionably the principle of the decision.

There is possibly one other ground, and only one, upon which the decision in the French-Glenn case might be rested.

The plaintiff in that case in the trial court and in the Supreme Court of Oregon, rested his claim exclusively upon the two propositions that the lake in fact actually abutted upon his lot at the point indicated by the plat, when the survey was made, although it had afterwards receded; and that whether this was the fact or not, the government and those claiming under it, were estopped by the representations of the plat, from asserting the contrary. The opinion of the Oregon court indicates that the possibility of deflecting the courses in order to reach the lake was not mooted. If the deflection of the lines was proposed in this court, it must have been largely as an afterthought, and without having laid the necessary foundation of proofs that the deflection could be accomplished without encroachment upon the vested rights of third parties. The same state of affairs was presented by the proofs and contentions in the analogous case of *Grant vs. Hemphill,* 92 Ia., 218.

In neither case, were there sufficient proofs to enable the court to determine intelligently, whether the courses could be deflected as proposed, without encroachment upon the monuments of adjacent owners

designated by the same survey and plat, and equally forceful with those of the party demanding the deflection. For in every instance of the patenting of land by reference to a plat covering a considerable number of adjacent tracts, the monuments of one patentee are no more sacred that the monuments of another, and as they are all disclosed by the same plat, each is as much obligated to respect the monuments of the others, as he is entitled to pursue his own. The principal which we have in view, was well illustrated in *James vs. Howell*, 41 Ohio St., 696, referred to further on, in connection with our review of defendant's state citations, in which a party claiming as owner of the shore of a lake, sued for the recovery of certain tracts lying out in the lake which had been patented to another party as islands, but which the plaintiff claimed were mere knolls in a flag farsh and therefore included in his tract, which as he claimed was shown by the plat to abut upon the lake.

But, as we elsewhere point out, the same plat which seemed to entitle the plaintiff James to a frontage upon the lake, also clearly disclosed as dry land and as meandered islands the land which the defendant Howell bought from the government. The principle of law which under ordinary circumstances would carry the James tract to the waters of the lake, would have been overstrained, if it had been so applied as to bereave the defendants of land which they had thus

bought in good faith in reliance upon the indications of the same plat.

In *White vs. Luning*, 93 U. S., 514, 525, there were included in a long and complicated description, a couple of monuments, to-wit, a certain fence and a certain ranch, which, if adhered to, would defeat the deed by making an *impossible* description. After the elimination of these monuments the description remained complete and consistent. It was held that, in order to complete a possible description and preserve the deed from defeat, the reference to the monuments might be rejected as surplusage.

The fact is commented upon by the defendants that in *Horne vs. Smith* the Nebraska case of *Lammers vs. Nissen* and a couple of other cases, upon which they rely, were cited in the opinion of the court; but it is very material to observe that they were cited *arguendo* only, by a member of the court, who, upon this subject, appears to have entertained opinions not in entire harmony with the majority of the court, as appears from his dissenting opinion in *Mitchell vs. Smale*, 140 U. S., at page 415.

As to the remark of Mr. Justice Bradley in *Mitchell vs. Smale*, at page 413, to the effect that in case of a plain and obvious mistake or palpable error of the surveyor in running a meander line, the government would have the right to recall the survey and

have it corrected by the courts or in some other way, and that such mistakes do not bind the government, it is to be observed that it contains nothing which countenances the position of these defendants. If he meant that the government could have such mistakes corrected after lands had been purchased in reliance upon the erroneous field notes and plat, (which doubtless he did not), he evidently intended at the same time to assert the efficacy of the plat and patents issued in accordince with it to pass the legal title until corrected by suit in equity to be brought by the government. The general rule of course is that titles acquired through mistake or even through fraud, cannot be recovered as against innocent purchasers. The government in its character of land owner is as much bound by this rule as an individual, and it is not conceivable that Mr. Justice Bradley intended to imply the contrary.

Of the other authorities relied upon by respondents almost every one has its root in the manifestly erroneous charge delivered to a jury by Mr. Justice Miller in *Granger vs. Swart,* 10 Fed. Rep., 961. It appears from the statement of facts in that case that the disputed tract of land was a marshy strip, which between the date of the government survey and the date of the entry had been added to the riparian tract by accretion. Apparently no claim was made by either

party that the meandered line as originally run did not exactly coincide with the then existing water line. It thus appears that the only question of law upon which Mr. Justice Miller was required to pass, was, whether accretions which between the date of survey and the date of entry are added to government lands bordering upon a water course, will pass under an entry of the government lot to which they have thus become joined. Of course they will so pass, as has been since authoritatively determined in *Jeffries vs. East Omaha Co.*, 134 U. S., 178, 194, 195.

Mr. Justice Miller's error, in holding that they would not pass, only has an interest for us, however, through the particular line of reasoning by which he was led to his result. His charge appears to have been delivered upon the assumption not only that a meander line is always and everywhere a boundary line, but that it is a boundary line of such extraordinary rigidity as to resist the general law of accretion. He said:

> "The patents and deeds under which the defendant claims, did not pass the title to the premises in question, unless *at the date of the entries on which they were issued* the Rock River, (where it is called a river), and Lake Koshkonong, (where it is called a lake), extended to and bordered upon the meandered line which constitutes the boundary lands described in the patents."

When one considers how slightly the nature of the meander line had been judicially canvassed prior to the Schurmeier case, it is not strange that even so able a judge as Mr. Justice Miller in the haste of a *nisi prius* trial of a comparatively unimportant case, should have misstated the law, but why and how it is that since the decision in the Schurmeier case his charge in the Swart case can continue to be cited as an authority that a meander line is in the nature of a boundary line, is certainly an unsearchable riddle.

It is important to observe that it is no longer a matter of speculation whether Mr. Justice Miller's reasoning in the Swart case contravenes the reasoning of this court in the Schurmeier case, for when, in *Jeffries vs East Omaha Land Co.*, 134 U. S., 178, 194-196, this court was repudiating the identical result which Mr. Justice Miller had reached in the Swart case, and were holding, contrary to his charge, that accretions to a government lot between the date of survey and date of entry would pass by patent, the authority to which they appealed as in principle decisive of the subject, was the Schurmeier case. They quote at length from the Schurmeier case and then add:

> "We are *therefore* of opinion that the patent * * * conveyed to the patentee the title to all accretion which had been formed up to that date." (P. 196).

Yet Mr. Justice Miller's great and well merited reputation as a lawyer is so much more widely diffused than is the capacity to test the accuracy of his utterances, that it has been assumed in many quarters, that his hasty charge to the jury, must, in some inscrutable manner, be susceptible of conciliation with the elaborate decision on the Schurmeier case in which after full argument he concurred.

No one has been able to explain how they could be reconciled, but upon the blind assumption that they must in some way be capable of reconciliation a certain class of courts have supposed themselves at liberty to follow the principle of the Swart case, even where it apparently diverges from that of the Schurmeier decision.

To this utterly indefensible assumption nearly every material authority on meander lines, cited by defendants can be traced. However extraordinary this assertion may seem, we propose now to verify it, by taking up in chronological order, every material case upon which the defendants rely.

The first in order of time is *Lammers vs. Nissen,* 4 Neb., 245, decided in 1876, eleven years after the Swart charge, and six years after the Schurmeier decision.

The Nebraska court in deciding the case does not so much as advert to the relative effect of large and

small discrepancies between the meander line and the actual water line, upon which, in the case at bar, counsel for defendants lay so much stress. They assume that the result of a divergence between the two lines is the same in the case of a small discrepancy as in the case of a large one. While not so much as referring to the Schurmeier case, they imply that it denied to a meandered line the force of a boundary line only in cases where it does in fact define the sinuosities of the stream. They then treat the case as settled by the authority of *Granger vs Swart,* saying:

> "In *Granger vs Swart,* the principle is enunciated that if between the meander line by which the government survey was made, and the bank of the river, there is, at the time, a body of swamp or waste lands, or flats, on which timber and grass grew, and horses and cattle fed, then the patents for the land surveyed would not cover this land, but must be confined to the actual limits of the meander line and include no more."

The decision thus rests squarely and exclusively upon the overruled case of *Granger vs Swart.*

Though this case was affirmed by this court, it was under a specific disclaimer of passing upon any question of law.

Lammers vs. Nissen, 154 U. S., 650.

As pointed out in 96 Iowa, at p. 423, the state decision in Lammer's case might be explained by its analogy to *Horne vs. Smith* and *Glenn vs. Jeffrey,* since it appeared that the meander line there involved coincided with the bank of a slough.

The case next in order, *James vs. Howell,* 41 O. St., 696, (A. D. 1885), is another positively laughable instance. Upon the plaintiff's appealing to the Schurmeier case in support of the contention that a meander line is not a boundary line, the Ohio court dismissed him by remarking that the Schurmeier case was concurred in by Miller, J., who three years before in *Granger vs. Swart* had charged the jury that the meander line was a boundary line. They then quote Mr. Justice Miller's charge at length and continue; "if the claim of counsel for James be true this charge was bad law," which the court with an alacrity much more flattering to Mr. Justice Miller than to themselves, conceived to be impossible. They therefore concluded that the Supreme Court in the Schurmeier case must have meant, only that a meander line is not a boundary line unless there is some indication of intention that it should be such; although what possible indication of such an intention could have been found by Mr. Justice Miller in the facts of the Swart case they do not pause to inquire. Irrespective of this peculiarity in its reasoning, however, the

case is of no significance whatever here. The same plat which seemed to entitle the plaintiff James to a frontage upon the lake, also clearly disclosed as dry land and as meandered islands the land which the defendant Howell had bought from the government. The principle of law which under ordinary circumstances would carry the James tract to the waters of the lake, would have been overstrained if it had been so applied as to bereave the defendants of land which they had thus bought in good faith in reliance upon the indications of the same plat. The question in which we are interested might have been approximately presented if the land sought to be recovered by James, instead of being the two meandered islands, had been a part of the swamp which surrounded them.

In the next case *Bissell vs. Fletcher,* 19 Neb., 725, (A. D. 1886), the Nebraska court merely quoted again from the case of *Granger vs. Swart,* and their own former decision in *Lammers vs. Nissen,* which they had based upon it, and again declared in broad terms that "where there is a strip of land between the bank of the river and the meander line, and entry of land bounded upon the meander line will not include such strip." Here again no reference was made to the difference, so much emphasized by counsel for these defendants, between a slight discrepancy and a great one.

The next case in order is *Wilson vs. Hoffman*, 70 Mich., 552, (A. D. 1888). The case has no relevancy *whatever to any question of law* with which we are concerned.

The next case is *Glenn vs. Jeffrey,* 75 Ia., 20, (A. D. 1888). The case was simply a forerunner of *Horne vs. Smith,* which is an exact duplicate of it. A survey had been extended only to a bayou, and the water thus reached had been by the surveyor demoninated the Missouri River. It was held that the nomenclature of the surveyor was immaterial, and that the survey extended only to the body of water, which, from a joint reading of the plat, the field notes and the ground, appeared to have been reached.

The next case in order is *Harrison vs. Stipes,* 34 Neb., 431, (A. D. 1892). Here for the third time the Nebraska court repudiated the authority of the Schurmeier case by declaring without any reference to the magnitude or extent of the discrepancy between the meander line and the water line, that "an entry of government land bounded by a meander line, does not include land lying at the time between such meander line and the bank of the river." The only citation made by the court was *Lammers vs. Nissen,* which is already noticed was in its turn based upon Mr. Justice Miller's charge in the Swart case. All these Nebraska cases are mere negations of the general rule.

In *Whitney vs. Detroit Lumber Co.*, 78 Wis., 240, the Wisconsin court, which, as hereinbefore shown, had freely acknowledged the supremacy of the actual water line as against the meander line of the government survey, laid down the erratic and arbitrary limitation that in the application of that principle it is not permissible for the purchaser of a government lot to go beyond the limits of his forty-acre lot in pursuit of the water frontage to which the survey and plat show him entitled; and this irrespective of the magnitude of the discrepancy between the two lines. It would seem to follow from this decision that in one case the party might be entitled to go substantially a quarter of a mile in pursuit of his water frontage, while in another case he might not be permitted to go as much as a single rod. The artificial limitation thus arbitrarily invented by the Wisconsin court has not so far as we are advised, received recognition elsewhere. It is a sufficient objection to it, that it really introduces by a forced process a greater degree of inequality than it is calculated to displace. Out of regard to a purely imaginary subdivisional line not purporting to be a boundary, it will permit a party to go in pursuit of his water frontage a hundred times as far as it will in another similar case. Gross inequality in results is bad enough when necessitated by the consistent observance of a rational distinction, and it becomes intolerable when produced by a distinction arbitarily invented.

N. Y. & T. Co. vs. Thomson, 83 Tex., 169, (A. D. 1891) possibly falls within the principle of *Horne vs. Smith,* since it was found that the surveyor was mistaken as to the identity of the channel at which he terminated his survey. Unless defensible upon this ground, the case amounts simply to an abandonment of the recognized rule that natural monuments must prevail over courses and distances.

Fulton vs. Fraudolig, 63 Texas, 330, 332, (A. D. 1885) also illustrates the divergence of Texas decisions from those of this court. It is simply a negation of the principle of *Mitchell vs. Smale,* 140 U. S., 406. The excess acreage in the form of a protruding point of land, which was held to pass in the Smale case as a part of the adjacent riparian tract, was several times larger than the similar point, which, in the Texas case was, under similar circumstances, held not to have passed. In other words, *Fulton vs. Fraudolig* belongs in the class of overruled cases, the question involved being a Federal question when it arises upon the construction of a Federal survey and patent.

Shoemaker vs. Hatch, 13 Nev., 261, (A. D. 1878), is identical in principle with the Federal case of *Horne vs. Smith,* above mentioned; the court holding that the surveyor had evidently mistaken the identity of the stream upon which he had terminated his survey.

The next case is *Grant vs. Hemphill,* 92 Ia., 218, (A. D. 1894). This is one of the few cases cited by defendants not manifestly resting upon *Granger vs. Swart.* It would be unprofitable to comment in detail upon the case, for the reason that if it can be construed to sustain the position of defendants, it must be regarded as overruled by the later case of *Schlosser vs. Crookshank,* 96 Ia., 414, (A. D. 1895), which we have elsewhere cited, and which fully sustained our position, in the case which of all those to be found in the books most resembles ours. But it can not be so construed. It is the exact duplicate of *French-Glenn vs. Springer,* 185 U. S., 47, upon which we have already commented.

The next case is *Fuller vs. Shedd,* 161 Ill., 462, (A. D. 1896). This is the first case affording any judicial recognition of the distinction which counsel for defendants draw between a slight and great discrepancy between the meander line and the water line. The court in its opinion in this case does elaborately present this distinction, but all that is said upon the subject is open to two criticisms: (1) It was by way of *obiter dictum,* as the court determined that in the case there under consideration the discrepancy was not great enough to justify adherence to the meander line (p. 482). (2) The theory thus presented appears to be merely the court's

interpretation of the cases which we have already considered, commencing with the overruled case of *Granger vs. Swart,* and so passing on to its progeny, *Lammers vs. Nissen, James vs. Howell,* etc.

No interpretation of these cases which fails to recognize the heresy that lurked in the Swart case, and its taint in the other decisions which have confessedly issued out of it, can have any claim to acceptance.

From this Illinois dictum the idea that the water boundary may be ignored in favor of the meandered line where the discrepancy between them is great, passed into a similar dictum in *Barnhart vs. Ehrhart,* 33 Ore., 274 (A. D. 1898). The court placed in the foreground of its list of authorities the overruled case of *Fulton vs. Fraudolig,* 63 Tex., 330, followed it with the overruled case of *Granger vs. Swart,* and the other decisions above cited to which it has given rise. That the proposition as enunciated in the Oregon case is in the nature of a dictum appears clearly from the fact pointed out by the court on pages 281 and 282, that Wild Horse Creek, the water way in question in that case, was not represented, either by the field notes or by the plat, as the boundary of the lands in question. On page 282, the court said that if the creek had been represented as a boundary in the field notes and upon the plat and had been a stream of any size

and value, the case might have been regarded as falling within the principal of the Schurmeier decision. The court say:

> "The field notes of the survey of 1871 do not purport to be a meander of Wild Horse Creek, nor does the amended plat contain the name of that stream."

The next case in order is *King vs. Watkins*, 98 Fed., 913, (A. D. 1899). By reference to the lower half of page 924 of the opinion, it will be seen that the issue was not between natural monuments on the one hand and unaided courses, distances and quantities on the other, *but was a case of conflicting natural monuments;* so that the court was of course at liberty to award priority to those natural monuments which were in harmony with the courses, distances and quantities. In other words, the court found the courses and distances to be corroborated by many of the natural monuments which were inconsistent with those relied upon by the defendant. The court pointed out, that to have adopted the natural monuments appealed to by the defendant would have left out of the tract some of the streams called for as falling within it, would have caused other streams to flow in the opposite direction from that assumed by the surveyor, and would have left other streams missing altogether. Thus, for example, by reference to Figs. 1 and 2 on pages 914

and 915 of the report, it will be seen that the westerly line of the tract, as laid down by the surveyor, crosses Pigeon Creek, while if the line had run as contended for by the defendant, it would not have approached Pigeon Creek.

TWELFTH POINT.

As involving the construction of a federal survey the case is reviewable by this court.

French-Glenn Co. vs. Springer, 185 U. S., 47, 54.
Cousin vs. Labatut, 19 How., 202.
Magwire vs. Tyler, 1 Black, 195, 203.
R. R. Co. vs. Schurmeier, 7 Wal., 272.
Kennedy's Executors vs. Hunt's Lessee, 7 How., 586 at p. 594.
Packer vs. Bird, 137 U. S., 661.
Knight vs. Land Assn., 142 U. S., 161.
Shively vs. Bowlby, 152 U. S., 1.
Glasgow vs. Baker, 128 U. S., 57.

The judgment should be reversed, and it appearing that upon the facts found, plaintiff was entitled to judgment, the cause should be remanded, with directions to enter judgment in favor of plaintiff as demanded in its complaint.

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